Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JOSE MARTIN AVELAR-CRUZ and GARY LAGUERRE,

Petitioners,

v.

JANET RENO, as Attorney General of the United States; DORIS MEISSNER, as Commissioner of the Immigration and Naturalization Service; BRIAN PERRYMAN, as Chicago District Director of the Immigration and Naturalization Service; and the IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners, longtime legal permanent residents of the United States, are barred from eligibility for relief from deportation based on the Attorney General's retroactive application of a 1996 amendment to the Immigration and Nationality Act (INA) enacted by Section 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA). Petitioners collectively challenged their final deportation orders on the grounds that Congress did not authorize application of Section 440(d) to pending deportation cases and that Section 440(d) violates the equal protection guarantee of the Fifth Amendment. Based on circuit precedents holding that direct review in the court of appeals by a petition for review had been repealed for aliens deportable on the basis of criminal convictions, petitioners brought their challenges in habeas corpus actions in federal district court. The Seventh Circuit, in contrast to the result now reached by six other circuits, held that the district courts did not have habeas corpus jurisdiction over either the statutory or the constitutional claim and accordingly dismissed petitioners' cases. Contrary to controlling circuit precedent, the court held that petitioners should have filed petitions for review but that the time for doing so had now expired; and contrary to subsequent circuit authority permitting review for aliens who filed habeas petitions based on pre-*LaGuerre* Seventh Circuit law, the court held that petitioners were now barred from obtaining review in any court, even of their constitutional claim. In *dicta*, the court stated that petitioners would have lost on the merits if review had been available.

QUESTIONS PRESENTED – Continued

The questions presented are:

1. Whether, in light of its own circuit precedent foreclosing review in the court of appeals by means of a petition for review, the lack of any reference to 28 U.S.C. 2241 in AEDPA and IIRIRA, and the requirements of the Constitution, the court of appeals erred in holding that petitioners were barred from challenging their deportation orders in habeas corpus proceedings under Section 2241.

2. Whether AEDPA Section 440(d) applies retroactively to immigration cases pending on the date of AEDPA's enactment.

3. Whether AEDPA Section 440(d) violates Equal Protection.

PARTIES TO THE PROCEEDINGS

Petitioners are Jose Martin Avelar-Cruz and Gary LaGuerre.

Respondents are Janet Reno, Attorney General of the United States; Doris Meissner, Commissioner of the Immigration and Naturalization Service; Brian Perryman, Chicago District Director of the Immigration and Naturalization Service; and the Immigration and Naturalization Service.

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PETITION FOR A WRIT OF CERTIORARI

Jose Martin Avelar-Cruz and Gary LaGuerre respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the court of appeals (App. 1a-13a)[1] is reported at 164 F.3d 1035. The judgments and docket entries of the district court are reported at 6 F. Supp.2d 744 for petitioner Avelar-Cruz (App. 14a-47a) and appear at 1998 WL 100238 for petitioner LaGuerre (App. 71a-103a). An earlier opinion of the court of appeals relating to petitioner Avelar-Cruz (App. 62a-70a) is reported at 58 F.3d 338. The decisions and orders of the immigration judge (App. 50a-59a, 106a-112a) and the decisions of the Board of Immigration Appeals (App. 60a-61a, 104a-105a) for both petitioners are unreported.

JURISDICTION

The opinion of the court of appeals was issued on December 22, 1998, a petition for rehearing was denied on April 9, 1999, and the judgment of the court of appeals was filed on April 20, 1999. App. at 1a, 113a, 115a. On June 28, 1999, Justice Stevens extended the time within which to file a petition for a writ of *certiorari* to and including September 6, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "App." refers to the separately bound appendix to this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 117a-124a) are pertinent portions of the Suspension of Habeas Corpus Clause, Art. I, § 9, Cl. 2, the Due Process Clause, and Art. III, § 1 of the Constitution; 28 U.S.C. 2241; 8 U.S.C. 1105a(a) and 1182(c) (1994), as in effect before and after April 24, 1996; Sections 401(e), 440(a), and 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1268, 1276, 1277; and Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625.

STATEMENT

This case concerns amendments to the Immigration and Nationality Act (INA) made in 1996 by the Antiterrorism and Effective Death Penalty Act (AEDPA), and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). The provisions at issue concern: (1) the jurisdiction of the federal courts; and (2) the relief available for longtime legal permanent residents deportable on the basis of their past criminal convictions. More specifically, the jurisdictional issue presented by this petition is whether the court of appeals erred in finding that habeas corpus jurisdiction under 28 U.S.C. 2241 has been repealed when neither AEDPA nor IIRIRA expressly repeals or even mentions Section 2241, when the elimination of habeas relief under Section 2241 raises complex constitutional questions regarding the scope of judicial review guaranteed by the Constitution (including, but not limited to, the Suspension Clause), and when the change in circuit precedent, announced without notice in this case, left the petitioners without any court in which to present even their constitutional claims. The issues on the

merits are whether a new restriction on statutory eligibility for relief from deportation applies retroactively, and whether the restriction violates equal protection by drawing an irrational distinction between deportable and excludable aliens.

Six other circuits have addressed the identical jurisdictional issue presented here and none has adopted the result or the reasoning of the Seventh Circuit. Five of those courts have also addressed the merits retroactivity issue presented here, and all five have held that the Attorney General erred in applying AEDPA 440(d) to all pending immigration cases. As a result, the federal courts are governed by contradictory jurisdictional rules and the Nation's immigration laws are subject to inconsistent application.

For the reasons stated below, the Court should grant *certiorari*, vacate the judgment of the court of appeals and remand for reconsideration in light of subsequent circuit and Supreme Court authority. Alternatively, the Court should grant plenary review of both the jurisdictional and the merits issues.

THE STATUTORY FRAMEWORK

1. *Relief from Deportation.* Aliens lawfully admitted for permanent residence who became subject to deportation because of a criminal conviction have long been statutorily authorized to apply for relief from deportation under former 8 U.S.C. 1182(c) if they met the eligibility criteria. Before 1996, those criteria were that the alien had a lawful unrelinquished domicile in this country for seven years, and, if his conviction was for an "aggravated felony" (as defined in the INA, 8 U.S.C. 1101(a)(43) (1994)), that he had not served a term of imprisonment for that conviction of five years or longer. 8 U.S.C. 1182(c)

(1995). The request for Section 1182(c) relief was adjudicated by an immigration judge as part of the deportation process and an order of deportation was not entered until the Section 1182(c) application was adjudicated. Over half of the total number of applications for Section 1182(c) relief were granted during fiscal years 1989 through 1994. *See Goncalves v. Reno*, 144 F.3d 110, 128 (1st Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 1140 (1999).

On April 24, 1996, the President signed AEDPA into law. Section 440(d) provides that any alien who "is deportable by reason of having committed" one of a broad range of enumerated criminal offenses is ineligible for relief under 8 U.S.C. 1182(c), even if the alien has not served any time in prison. By its express terms, Section 440(d) applies only to deportable and not excludable aliens, and thus would not have applied to petitioners if they had travelled abroad and sought relief in exclusion proceedings when seeking to re-enter the country. The provision is silent, however, on whether it applies to immigration cases pending on the date of its enactment.

The Attorney General addressed the temporal scope of 440(d) when she issued a formal ruling (overruling the Board of Immigration Appeals) holding that AEDPA 440(d)'s new eligibility restrictions were applicable to all Section 1182(c) requests, regardless of when they were submitted or when the immigration proceeding commenced. *Matter of Soriano*, Int. Dec. No. 3289 (AG Feb. 21, 1997) (App. 125a). The Attorney General noted that Section 440(d) itself did not contain an express statement addressing the provision's temporal reach and concluded, on that basis alone, that Congress had not prescribed the cases to which Section 440(d) applies. The Attorney General's ruling pre-dated this Court's decisions in *Lindh v. Murphy*, 521 U.S. 320 (1997), and *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), and did

not consider whether congressional intent could be discerned from the statute's structure or its legislative history. Finding no evidence of congressional intent in the text of AEDPA 440(d), the Attorney General applied judicial default rules and held that application of the new restrictions to pending cases did not have "retroactive effect" under *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

Five courts of appeals have now held that the Attorney General erred in *Matter of Soriano* in holding that AEDPA 440(d) applies to all Section 1182(c) cases pending when AEDPA became law. In each case, the circuits found that the specific language, structure and legislative history of AEDPA Title IV demonstrated congressional intent to apply Section 440(d) prospectively based on the "normal rules" of statutory construction, *Lindh*, 521 U.S. at 326, and that resort to judicial default rules was not warranted. Because these courts found that the statute did not apply retroactively, they had no occasion to address the equal protection challenge to AEDPA 440(d)'s differing treatment of deportable and excludable aliens. *See Shah v. Reno*, No. 98-2636, 1999 WL 493681, at *5 (8th Cir. July 1, 1999); *Mayers v. INS*, 175 F.3d 1289, 1301-04 (11th Cir. 1999); *Sandoval v. Reno*, 166 F.3d 225, 239-42 (3d Cir.), *reh'g en banc denied*, ___ F.3d ___ (May 7, 1999); *Henderson v. INS*, 157 F.3d 106, 128-30 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas*, ___ U.S. ___, 119 S. Ct. 1141 (1999); *Goncalves*, 144 F.3d at 126-33.[2]

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[2] The Tenth Circuit found habeas jurisdiction to review a statutory retroactivity claim, but it did not address the precise merits question in this case, *i.e.*, whether Section 440(d) applies to immigration proceedings that were pending on AEDPA's effective date. It decided only that Section 440(d) does apply to pre-AEDPA *convictions*. *Jurado-Gutierrez v. Greene*, No. 97-1437, 1999 WL 637038, at *9 n.9 (10th Cir. Aug. 19, 1999). The Third

2. *Judicial Review.* Before AEDPA and IIRIRA, judicial review of final orders of deportation was governed by 8 U.S.C. 1105a. Under Section 1105a(a), review of final orders of deportation – regardless of the basis for the order – occurred by a petition for review directly in the courts of appeals. The statute further specified that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings," 8 U.S.C. 1105a(a)(10), but the courts of appeals disagreed about when an alien could invoke such habeas review. *See, e.g., Nakaranurack v. INS*, 68 F.3d 290 (9th Cir. 1995); *Williams v. INS*, 795 F.2d 738 (9th Cir. 1986); *United States ex rel. Marcello v. INS*, 634 F.2d 964 (5th Cir. 1981).

a. The 1996 Amendments. AEDPA enacted two changes to 8 U.S.C. 1105a. First, in Subtitle A of Title IV, AEDPA 401(e) repealed the habeas provision in Section 1105a(a)(10). Second, in Subtitle B, AEDPA 440(a) amended Section 1105a(a)(10) to provide that no court shall review final orders of deportation entered against immigrants who are deportable based on enumerated criminal grounds.[3]

Circuit has now issued holdings on both pre-AEDPA proceedings and convictions, ruling in *Sandoval, supra*, that Section 440(d) does *not* apply to immigration proceedings commenced before AEDPA, but holding in *DeSousa v. Reno*, No. 99-1115, 1999 WL 643171 (3d Cir. Aug. 25, 1999), that Section 440(d) does apply to pre-AEDPA convictions when immigration proceedings commenced after AEDPA. Both the Third and Tenth Circuits rejected an equal protection challenge to Section 440(d). *DeSousa*, 1999 WL 643171, at *5-*8; *Jurado-Gutierrez*, 1999 WL 637038, at *14-*15.

[3] Section 440(a) provides: "Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by [enumerated grounds of deportation] shall not be subject to review by any court." AEDPA 440(a), 110 Stat. 1276.

IIRIRA became law four months later and enacted more comprehensive changes to judicial review. First, it enacted special "transitional" rules amending Section 1105a. The transitional rules govern judicial review of deportation cases – such as those of these petitioners – where immigration proceedings commenced *before* April 1, 1997, and the BIA's final order of deportation issued *after* October 30, 1996. *See* IIRIRA 309(a), (c)(1) & (4); *Reno v. American-Arab Anti-Discrimination Committee*, ___ U.S. ___, 119 S. Ct. 936 (1999).[4] Section 309(c)(4)(G) of the transitional rules provides that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in [enumerated INA sections]." IIRIRA 309(c)(4)(G), 110 Stat. 3009-626. These uncodified transitional judicial review rules apply notwithstanding any provision of Section 1105a to the contrary. IIRIRA 309(c), 110 Stat. 3009-625. Second, IIRIRA repealed Section 1105a altogether and enacted a new permanent judicial review statute for immigration cases initiated on or after April 1, 1997 (now called "removal" proceedings). This provision, codified at 8 U.S.C. 1252, applies only to "removal" cases, and has no application to this case. *See* 8 U.S.C. 1252 (Supp. II 1996).[5]

None of the various amendments to the judicial review statutes enacted by AEDPA or IIRIRA expressly

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[4] For cases with a final BIA order issued *before* October 31, 1996, the transitional rules do *not* apply and only Section 1105a (as amended by AEDPA) governs judicial review. IIRIRA 309(c)(2).

[5] One provision of Section 1252, subsection (g), applies to pre-April 1, 1997 cases but only to a narrow subset of claims that are not raised here, as petitioners seek review only of a final order of deportation. *American-Arab Anti-Discrimination Committee*, 119 S. Ct. at 943.

amend or address the general grant of habeas corpus jurisdiction to the federal courts under 28 U.S.C. 2241. AEDPA and IIRIRA's transitional (and permanent) rules make no mention of Section 2241 at all.

b. Application of AEDPA and IIRIRA's Transitional Rules by the Courts of Appeals. The effect of the new statutes on the federal courts' jurisdiction to review final deportation orders first arose in the context of petitions for review filed in the courts of appeals. Over the objection of immigrants seeking to preserve court of appeals' jurisdiction over petitions for review, the circuit courts, including the Seventh Circuit, overwhelmingly held that AEDPA 440(a) and IIRIRA transitional rule 309(c)(4)(G) repealed the circuit courts' jurisdiction over petitions for review filed by immigrants deportable on criminal grounds seeking to challenge the denial of relief from deportation. In each of these decisions, however, the circuit courts dismissed the petitions for review without foreclosing, and in many cases expressly assuming, the availability of habeas review.[6] The courts of appeals declined to decide whether habeas corpus was definitively available (or to address the scope of review that habeas might provide) until the alien had filed a district court habeas corpus action. Some immigrants unsuccessfully sought *certiorari* in this Court of those rulings on the ground that the Constitution,

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[6] *See Turkhan v. INS*, 123 F.3d 487, 489-90 (7th Cir. 1997); *Chow v. INS*, 113 F.3d 659, 668 (7th Cir. 1997). *See also Lerma de Garcia v. INS*, 141 F.3d 215 (5th Cir.), *reh'g en banc denied*, 159 F.3d 1358 (1998); *Mansour v. INS*, 123 F.3d 423, 426 (6th Cir. 1997); *Fernandez v. INS*, 113 F.3d 1151, 1155 (10th Cir. 1997); *Boston-Bollers v. INS*, 106 F.3d 352, 354 n.1 (11th Cir. 1997); *Kolster v. INS*, 101 F.3d 785, 790 (1st Cir. 1996); *Salazar-Haro v. INS*, 95 F.3d 309, 311 (3d Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997); *Hincapie-Nieto v. INS*, 92 F.3d 27, 30-31 (2d Cir. 1996); *Duldulao v. INS*, 90 F.3d 396, 400 n.4 (9th Cir. 1996).

including the Suspension Clause, required preservation of judicial review. The Solicitor General opposed *certiorari* on the basis, *inter alia*, that any claim under the Constitution's Suspension Clause must await the filing of a habeas corpus petition.[7]

In the face of these uniform circuit court decisions, immigrants (like the petitioners here) filed habeas corpus actions to obtain judicial review of their final orders of deportation. Seven courts of appeals have now squarely ruled on the availability of habeas corpus in cases governed by AEDPA 440(a) or IIRIRA 309(c)(4)(G) to challenge AEDPA 440(d) on statutory retroactivity and constitutional equal protection grounds. Contrary to the ruling in this case, the other six circuits have held that AEDPA and IIRIRA's transitional rules do not repeal the district courts' habeas corpus jurisdiction under 28 U.S.C. 2241, and that the scope of such review includes both the constitutional and statutory claims. Those courts concluded that the repeal of Section 2241 must be express, that the applicable provisions of AEDPA and IIRIRA do not mention Section 2241, and that preserving the district courts' habeas corpus jurisdiction avoids difficult and complex constitutional questions that would otherwise be raised by the bar on court of appeals review of deportation orders. *See Jurado-Gutierrez*, 1999 WL 637038, at *4-*8;

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[7] Brief for the Respondent [INS] in Opposition at 23, *Katsoulis v. INS*, No. 97-379 (filed Nov. 1997), *cert. denied*, ___U.S.___, 118 S. Ct. 624 (1997) (opposing *certiorari* and arguing that any claim under Suspension Clause was not properly presented because petitioner "did not seek a writ of habeas corpus"); Brief for the [INS] in Opposition at 15, *Chamorro-Torres v. INS*, No. 96-985 (filed Jan. 1997), *cert. denied*, 520 U.S. 1103 (1997) (same); Brief for the [INS] in Opposition at 9, *Qasguargis v. INS*, No. 96-806 (filed Jan. 1997), *cert. denied*, 519 U.S. 1148 (1997) (same).

Shah, 1999 WL 493681, at *1-*4; *Mayers*, 175 F.3d at 1295-1301; *Sandoval*, 116 F.3d at 229-38; *Henderson*, 157 F.3d at 118-22; *Goncalves*, 114 F.3d at 116-26.

c. The Government's Prior Certiorari Petitions. Last Term, the Solicitor General petitioned for *certiorari* on both the jurisdictional and statutory retroactivity question in three cases and presented the Court with the split in circuit authority precipitated by the decision in this case (in which a petition for rehearing then remained pending). The Court denied *certiorari* in two cases, and remanded the other in light of *American-Arab Anti-Discrimination Committee*. *See Reno v. Goncalves*, 119 S. Ct. 1140 (1999); *Reno v. Navas*, 119 S. Ct. 1141 (1999); *INS v. Magana-Pizano*, 119 S. Ct. 1137 (1999).[8] Since then, and subsequent to the opinion in this case, the Third, Eighth, Tenth and Eleventh Circuits have agreed with the majority approach and have held that Section 2241 remains available to review final deportation orders for both constitutional and statutory error. *See Jurado-Gutierrez*, 1999 WL 637038, at *8; *Shah*, 1999 WL 493681, at *4; *Mayers*, 175 F.3d at 1301; *Sandoval*, 116 F.3d at 238.

d. Seventh Circuit Precedent. The Seventh Circuit has had four sets of (conflicting) precedent. First, in *Yang v. INS*, 109 F.3d 1185 (7th Cir.), *cert. denied sub nom. Katsoulis v. INS*, ___ U.S. ___, 118 S. Ct. 624 (1997), the court stated in *dicta* that habeas review would be abolished when IIRIRA took effect, and that insofar as any review was available to challenge the denial of relief from deportation, that review must be sought in the court of appeals

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[8] In *Magana-Pizano*, the Ninth Circuit ruled, based on now-vacated circuit precedent, that Section 1252(g) had repealed 28 U.S.C. 2241 for cases governed by IIRIRA's transitional rules and that such repeal was unconstitutional. *American-Arab's* narrow reading of Section 1252(g) requires the Ninth Circuit to reconsider whether its constitutional ruling was necessary.

by means of a petition for review.[9] Second, contrary to *Yang*, the court then unequivocally held, in *Chow v. INS*, 113 F.3d 659 (7th Cir. 1997), and *Turkhan v. INS*, 123 F.3d 487 (7th Cir. 1997) ("*Turkhan I*"), that there was no review available in the court of appeals to challenge the denial of relief from deportation – even on constitutional grounds – and that aliens seeking such review could not bring petitions for review. However, both *Chow* and *Turkhan I* expressly stated that habeas review might still be available. Third, in this case the Seventh Circuit held that habeas review was *not* available and, contrary to *Chow* and *Turkhan I*, that a petition for review *could* still be filed in the court of appeals to challenge the denial of relief from deportation (at least to raise constitutional claims, and possibly also to bring a statutory retroactivity challenge). Finally, the Seventh Circuit has recently issued two subsequent opinions stating that the decision in this case changed circuit precedent and that aliens who followed *Chow* and *Turkhan I* by filing habeas corpus actions instead of filing petitions for review "could not have known" that they were filing in the wrong court. *Singh v. Reno*, No. 98-3584, 1999 WL 335675, at *5 (7th Cir. May 26, 1999); *Turkhan v Perryman*, No. 98-1964, 1999 WL 615531, at *6 (7th Cir. Aug. 16, 1999) ("*Turkan II*"). In both of those cases the court found that the alien was entitled to obtain judicial review, either by habeas corpus in the district court (*Turkhan II*) or by direct review in the court of appeals (*Singh*), because immigrants should not be penalized for following then-controlling precedent.

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[9] *Yang* also held that Section 440(a) allowed the courts of appeals to determine the existence of the three statutory conditions – alienage, deportability, and conviction of a disqualifying offense – on which the denial of review depends. *Yang*, 109 F.3d at 1192, 1196.

STATEMENT OF FACTS

1. Administrative and District Court Proceedings.

Avelar-Cruz. Jose Martin Avelar-Cruz came to the United States as a child and has been a permanent resident since 1989. In 1993 the INS commenced deportation proceedings against him based on a criminal conviction. In 1994, he applied for a waiver of deportation under Section 1182(c), but the Immigration Judge (IJ) and BIA ruled that he was not statutorily eligible for relief under the pre-AEDPA criteria. The Seventh Circuit reversed and remanded to the BIA in June 1995, holding that Avelar-Cruz was statutorily eligible. *Avelar-Cruz v. INS*, 58 F.3d 338 (7th Cir. 1995) (App. 62a). More than seven months later, in February 1996, the BIA remanded to the IJ for a hearing on the Section 1182(c) application. Nine months after the BIA's remand order, the IJ conducted a hearing. By that time AEDPA had been enacted and the IJ ruled that Section 440(d) now rendered Avelar-Cruz ineligible for Section 1182(c). On January 8, 1998, the BIA affirmed based on the Attorney General's ruling in *Matter of Soriano* holding that Section 440(d) applies retroactively.

When the BIA issued the final deportation order, the Seventh Circuit had already held in *Chow* and *Turkhan I* that the court of appeals' petition-for-review jurisdiction had been repealed. Accordingly, Avelar-Cruz sought review by habeas corpus to challenge AEDPA 440(d) on statutory retroactivity and constitutional equal protection grounds. The district court exercised jurisdiction over both claims, rejected the statutory claim, and ruled for Avelar-Cruz on the constitutional equal protection claim.

LaGuerre. Gary LaGuerre also came to the United States as a child and has been a permanent resident since 1985. In December 1995, the INS commenced deportation proceedings against him based on a criminal conviction. LaGuerre's immigration hearing occurred in October

1996, by which time AEDPA had become law. LaGuerre sought to apply for a waiver of deportation under Section 1182(c), but the IJ ruled that he had been rendered ineligible by AEDPA 440(d). The BIA affirmed based on *Matter of Soriano*. The BIA's final order of deportation was issued on August 1, 1997. In light of the Seventh Circuit's rulings in *Chow* and *Turkhan I*, LaGuerre filed a habeas corpus action in district court raising a statutory retroactivity challenge to the Attorney General's *Soriano* ruling. The district court exercised jurisdiction but denied the petition on the merits.

2. The Court of Appeals Opinion.

a. The court of appeals consolidated the two habeas appeals. App. 1a. It held that AEDPA 440(a) deprived the district courts of habeas corpus jurisdiction under 28 U.S.C. 2241, but suggested that immigrants could continue to bring some claims in the court of appeals by a petition for review. The court denied all review to these petitioners, however, stating that they had "brought their actions in the wrong court under the wrong statute" and it was "now too late for them to file a petition for review in the right court . . . " App. 10a. The court did not reconcile its ruling with the circuit's prior holdings in *Chow* and *Turkhan I* (*i.e.*, that the court of appeals could not entertain petitions for review challenging the denial of a waiver – even on constitutional grounds), nor did the opinion address the fact that *Chow* and *Turkhan I* were the controlling precedent at the time these petitioners sought judicial review.

The court did not find that AEDPA had expressly amended or repealed the general federal habeas corpus statute, 28 U.S.C. 2241, and noted the "omission from section 440(a) of an explicit reference to 28 U.S.C. § 2241." App. 6a. The court nonetheless held that access to Section

2241 had been repealed based on its view that the "purpose" of the amendments was inconsistent with the availability of district court habeas corpus review. App. 6a. The court did not address whether AEDPA, IIRIRA, or the general intent the court attributed to Congress were sufficient to satisfy the rule of *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), and *Felker v. Turpin*, 518 U.S. 651 (1996), that repeal of Section 2241 must be express and cannot be implied.[10]

The court of appeals rejected any concern that the Suspension Clause might entitle petitioners to review of their claims. The opinion states that the Suspension Clause ensures review only when the "jurisdiction" of the detaining authority was at issue. App. 5a. Applying that standard, the court of appeals concluded that the Suspension Clause did not encompass petitioners' claims because it believed there was no question about the "jurisdiction" of the detaining authorities, as petitioners were seeking to litigate "whether they are entitled to ask for discretionary relief" from deportation. App. 5a. The court of appeals did not address petitioners' additional contention that the right to judicial review over their statutory and constitutional claims was also guaranteed by due process and Article III's separation of powers principle.

The court suggested that the statute did not necessarily extinguish all judicial review and assumed that the court of appeals could hear some constitutional claims in a petition for review, App. 8a (citing *Webster v. Doe*, 486

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[10] The court's holding that Section 2241 was repealed is based solely on AEDPA 440(a) and does not consider or address the transitional judicial review provision, IIRIRA 309(c)(4)(G), that specifically governs the judicial review of these final orders because they were issued after October 30, 1996. *See supra* at 7.

U.S. 592 (1988)) and "maybe" even a statutory retroactivity claim. App. 12a.[11] The opinion did not explain how the plain text of Section 440(a) would be construed to permit review in the court of appeals of non-constitutional claims. In any event, the court held that these petitioners could not take advantage of whatever review remained in the courts of appeals because they had not filed petitions for review and it was now too late for them to do so. App. 10a.

Finally, the court crafted an additional exception on the door-closing effect of Section 440(a) by indicating that "if for reasons beyond the alien's control he could not have raised his substantial constitutional claims in this court by seeking review here directly under section 440(a), he may be able to proceed in the district court under 28 U.S.C. § 2241." App. 10a. The opinion does not explain why this exception does not apply to the petitioners themselves. *Compare Turkhan II*, 1999 WL 615531, at *6-*7.

b. The opinion also expresses a view on the merits of petitioners' statutory and constitutional claims. It states that AEDPA's provisions, taken together, make it "impossible for us to determine whether as a matter of legislative intent . . . [Section 440(d)] is to be applied prospectively or retroactively." App. 10a-11a. The court then concluded that while a statute governing "primary

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[11] The opinion suggested that the Third, Tenth and Eleventh Circuits might follow its approach in light of preliminary rulings by those circuits. App. 8a-9a. All three circuits, however, have subsequently issued holdings upholding district court habeas corpus under Section 2241 over the identical claims presented in this case. *See Jurado-Gutierrez*, 1999 WL 637038, at *4-*8; *Mayers*, 175 F.3d at 1295-1301; *Sandoval*, 166 F.3d at 229-38.

(out of court) duties" or "disturb[ing] reasonable expectations" is presumed not to apply retroactively, App. 11a, Section 440(d) applies to all cases because immigrants do not base any actions on whether they will be eligible for a waiver of deportation. App. 11a-12a. The court also rejected the equal protection challenge to Section 440(d) on the ground that Section 440(d) creates an incentive for deportable aliens to leave the country voluntarily to take advantage of the opportunity to seek a Section 1182(c) waiver in exclusion proceedings. App. 12a.

c. The Seventh Circuit denied rehearing *en banc* over the dissent of Judges Ripple, Rovner, and D. Wood. App. 113a-114a.

REASONS FOR GRANTING THE PETITION

The court of appeals ruled that AEDPA repealed all habeas corpus jurisdiction over petitioners' deportation orders, and held that whatever limited judicial review remains for immigrants deportable on criminal grounds lies exclusively in the court of appeals by means of a petition for review. App. 8a-9a. That result has been rejected by every other circuit to consider the issue.

Six other circuits have now ruled on the precise jurisdictional issue in this case (the First, Second, Third, Eighth, Tenth, and Eleventh), and *all six* have held that the amendments made by AEDPA and IIRIRA's transitional rules do not repeal habeas jurisdiction but, instead, limit the jurisdiction of the courts of appeals to adjudicate petitions for review – the exact opposite conclusion reached by the Seventh Circuit. *Jurado-Gutierrez*, 1999 WL 637038, at *4-*8; *Shah*, 1999 WL 493681, at *1-*4; *Mayers*, 175 F.3d at 1295-1301; *Sandoval*, 116 F.3d at 229-38; *Henderson*, 157 F.3d at 118-22; *Goncalves*, 144 F.3d at 116-26. *Cf. Lerma de Garcia*, 141 F.3d at 217 (dismissing petition for review but finding that habeas remains available without

addressing scope of review); *Mansour v. INS*, 123 F.3d 423, 426 (6th Cir. 1997) (same); *Ramallo v. Reno*, 114 F.3d 1210, 1214 (D.C. Cir. 1997), *cert. denied*, 119 S. Ct. 1139 (1999) (dismissing § 1331 district court action challenging deportation, but finding that habeas review remained available).[12]

Likewise, the court of appeals' ruling on the temporal scope of AEDPA 440(d) is contrary to the holdings of five other circuits. *See Shah*, 1999 WL 493681, at *5; *Mayers*, 175 F.3d at 1304; *Sandoval*, 166 F.3d at 242; *Henderson*, 157 F.3d at 129-30; *Goncalves*, 144 F.3d at 133. Only in the Seventh Circuit are longtime, legal permanent residents disqualified from eligibility for relief from deportation under Section 1182(c) and subject to automatic deportation, even if they were put into immigration proceedings long before that provision was enacted. This stark lack of uniformity has already caused, in Chicago alone, many immigrants to be deported and many more to face imminent deportation.[13]

For the reasons discussed more fully below, the conflict created by the Seventh Circuit – on nationally-applicable questions affecting the lives of thousands of longtime lawful residents – warrants this Court's plenary

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[12] All six circuits have also uniformly rejected the argument that only constitutional claims are reviewable and have instead held that the statutory retroactivity challenge raised by the petitioners in this case is also reviewable under Section 2241. *See Jurado-Gutierrez*, 1999 WL 637038, at *6-*8; *Shah*, 1999 WL 493681, at *2-*4; *Mayers*, 175 F.3d at 1300-01; *Sandoval*, 166 F.3d at 231-38; *Henderson*, 157 F.3d at 120-22; *Goncalves*, 144 F.3d at 123-25.

[13] Petitioners acknowledge that the opinion's comments on the merits constitute *dicta* in this case, but the Seventh Circuit has subsequently relied on the discussion to resolve the issue for the Seventh Circuit. *See Singh*, 1999 WL 335675, at *4. *See also Turkhan II*, 1999 WL 615531, at *12.

review. The Seventh Circuit's ruling subjects immigrants to divergent jurisdictional rules and inconsistent interpretations of the immigration laws depending on the state in which they reside.

However, because of subsequent significant developments in the Seventh Circuit and the particular circumstances of this case, plenary review is not necessary. Petitioners respectfully submit that the proper disposition is a remand to the court of appeals for further consideration of the jurisdictional question in light of the Seventh Circuit's subsequently issued and conflicting jurisdictional rulings, and for further consideration of the retroactivity issue in light of this Court's decision in *Martin v. Hadix*, ___ U.S. ___, 119 S. Ct. 1998 (1999). Alternatively, the Court should grant plenary review on both jurisdiction and the merits.

I. The Court Should Grant the Writ, Vacate the Judgment, and Remand to the Court of Appeals in Light of Conflicts Within the Seventh Circuit Regarding the Jurisdiction of the Federal Courts.

The court of appeals broadly held that the proper forum in which to seek judicial review in cases governed by AEDPA 440(a) is the court of appeals and not the district court in a habeas action. However, this case can and should be resolved on narrow grounds. The opinion held that the petitioners had sought review "in the wrong court," *see* App. 10a, even though they complied with the clear holdings and the explicit directions of the Seventh Circuit's then-controlling law. Those decisions, *Chow* and *Turkhan I*, were issued before these petitioners received their final orders of deportation and specifically held that petitions for review were barred, instructing immigrants to seek review by other means, including habeas corpus. Petitioners followed the route prescribed by the Seventh

Circuit, only to be told that they should have chosen the route that the court had previously foreclosed.

Regardless of whether a circuit court writing on a clean slate might properly find that review belongs in the court of appeals in light of AEDPA 440(a), the court of appeals may not first announce that jurisdiction over petitions for review has been repealed and then, after the thirty-day filing deadline for petitions for review has elapsed, reverse its decision and hold that petitioners who failed to file timely petitions for review have irretrievably forfeited their right to judicial review altogether. Yet that is precisely what occurred here, thereby precluding review even of petitioners' constitutional claims.

Chow and *Turkhan I* unmistakably held that the 1996 amendments eliminated any jurisdiction in the *courts of appeals* over petitions for review brought by aliens deportable on criminal grounds challenging denial of relief from deportation. *See Turkhan I*, 123 F.3d at 490; *Chow*, 113 F.3d at 669-70. The Seventh Circuit dismissed petitions for review in both cases even though the petitioners raised constitutional challenges to their deportation orders and Turkhan specifically argued that jurisdiction over constitutional claims was not repealed. *Turkhan I*, 123 F.3d at 490 (*Chow* "decisively refutes Turkhan's contention that § 440(a) must still permit constitutional challenges brought [in the court of appeals]"); *id.* ("[i]n [*Chow*] we declined to read an exception for constitutional claims into the language of § 440(a) of the AEDPA."). At the same time, *Chow* and *Turkhan I* expressly left open other possibilities for judicial review, including habeas corpus actions. *Id.* at 490 ("*Chow* . . . makes clear that even if review pursuant to INA § 106(a) is foreclosed, other avenues for review remain open") (quotations and citations omitted); *Chow*, 113 F.3d

at 669-70. The critical point is that both cases unmistakably stated that, wherever review may lie, it could not be sought in the court of appeals. Accordingly, there was no reason and no basis for these petitioners to file petitions for review when they sought judicial review.

In two decisions issued after rehearing was denied in this case, the Seventh Circuit held that immigrants will not be barred from obtaining judicial review because they failed to file a petition for review under pre-*LaGuerre* circuit law. In *Singh*, the immigrant, like the petitioners here, did not file a petition for review but instead sought review by means of a district court habeas action. *Singh*, 1999 WL 335675, at *1. The Seventh Circuit remanded the case to the Immigration Judge for further administrative proceedings on the basis of the due process claim. In doing so, the Court held that, in light of *LaGuerre*, there was no habeas jurisdiction available and dismissed the district court action. *Id.* at *2. But, noting that aliens should not be penalized for relying on then-controlling circuit precedent, the Court held that "because Singh could not have known that he was in the wrong court – our case law pre-*LaGuerre* would have directed him to the district court rather than to this Court – we believe he is entitled to another chance to argue his case." *Id.* On this basis, the Court rejected the government's contention that Singh had forfeited his right to judicial review and permitted him to obtain direct review in the court of appeals.

Likewise, in *Turkhan II* (an appeal of a habeas action filed after the court of appeals dismissed the alien's petition for review in *Turkhan I*), the Seventh Circuit permitted the alien to obtain habeas review, notwithstanding *LaGuerre*. As in *Singh*, the Seventh Circuit acknowledged that it had previously held in *Chow* and *Turkhan I* that AEDPA and IIRIRA's transitional rules divested the courts of appeals of jurisdiction to adjudicate petitions

for review filed by aliens with criminal convictions: "[b]ased on the law of this Circuit [in *Chow*] at the time we reviewed [Turkhan's] consolidated appeal, we concluded that we did not have jurisdiction to hear his claims pursuant to AEDPA § 440(a) or IIRIRA § 309(c)." *Turkham II*, 1999 WL 615531, at *7. The Court then quoted *Singh* with approval for the proposition that an alien "could not have known that he was in the wrong court" and that "he [was] entitled to another chance to argue his case." *Id.*[14]

Petitioners respectfully submit that the judgment should be vacated and remanded to the Seventh Circuit to reconcile the decision below with the subsequent and conflicting circuit rulings. First, in an effort to eliminate the inter-circuit conflict, the court of appeals should reconcile the decision in this case with the decisions from the other courts of appeals on the broad question whether aliens with criminal convictions should seek review in the court of appeals or district court. But, regardless of the Seventh Circuit's reconsideration of the broad jurisdictional question, a remand is necessary to allow the court of appeals to reconcile the dismissal of these petitioners' habeas petitions with its subsequent rulings in *Singh* and *Turkhan II*. In both cases, the Seventh Circuit candidly acknowledged the unfairness of withdrawing judicial review over cases, like petitioners, where the alien "could not have known that [they] were headed for the wrong

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[14] The fact that the alien in *Turkhan II* had filed a petition for review which the Seventh Circuit dismissed is irrelevant. If the court of appeals were to place any significance on that factor, it would be tantamount to denying any controlling force to opinions beyond the actual case in which they are issued. Here, petitioners were identically situated to the aliens in *Chow* and *Turkhan I*, and correctly read those rulings as foreclosing their right to file petitions for review.

court" and held that the alien should not "be prejudiced for failing to seek review in this Court [of Appeals] within the statutory 30-day deadline" given the "case law of this circuit" at the time. *Singh*, 1999 WL 335675, at *5.

II. In the Alternative, the Court Should Grant Plenary Review to Resolve the Circuit Conflict Over the Proper Jurisdiction of the Federal Courts.

1. If the Court does not vacate the judgment and remand to the court of appeals, then plenary review is warranted. The Seventh Circuit's ruling is in conflict with the result uniformly adopted by six other circuits and concerns a nationally-applicable question of jurisdiction affecting the operation of the federal courts and the predictability of rules governing judicial review of final deportation orders.

2. The Seventh Circuit's analysis also raises far-reaching constitutional questions concerning the limits on Congress's power to regulate the jurisdiction of the federal courts. As the other circuits have recognized, if the 1996 amendments are construed to preserve Section 2241 jurisdiction over deportation orders, it is unnecessary to decide whether the scope of review guaranteed directly by the Constitution encompasses statutory claims because Section 2241's plain terms set forth its scope of review. 28 U.S.C. 2241(c)(3) (violations of the "Constitution or laws or treaties of the United States"). *See, e.g., Jurado-Gutierrez*, 1999 WL 637038, at *8; *Shah*, 1999 WL 493681, at *3; *Sandoval*, 166 F.3d at 237; *Goncalves*, 144 F.3d at 122. *See also Felker*, 518 U.S. at 661-62 (resolution of Article III questions unnecessary because of availability of § 2241).

The Seventh Circuit appeared to suggest that its approach might also avoid constitutional adjudication by exempting constitutional claims from the bar on review in

the court of appeals and suggesting that "maybe" statutory retroactivity claims could also be exempted because it "seem[ed] unlikely that Congress would have wanted the Board to have the final word on so pure and fundamental a question of law as when the statute went into effect." App. 12a. However, under the Seventh Circuit's analysis, other types of statutory claims would appear to be barred. Consequently, the court's approach will compel it to address far-reaching questions regarding the constitutional right to review of statutory challenges to deportation orders, such as, for example, the statutory violation the Seventh Circuit found in Avelar-Cruz's first appeal to the circuit. *See Avelar-Cruz v. INS*, 58 F.3d 338 (7th Cir. 1995) (finding that BIA misinterpreted seven-year requirement in 8 U.S.C. Section 1182(c)) (App. 62a). *See also Kolster v. INS*, 101 F.3d 785, 787 (1st Cir. 1996) (raising claim regarding seven-year eligibility requirement).

3. Finally, the court of appeal's Suspension Clause analysis is incorrect, cannot be squared with this Court's decisions, and has been rejected by the other circuits. The court of appeals stated that the Suspension Clause did not encompass petitioners' claims and that the scope of review guaranteed by the Suspension Clause does not move in "lockstep" with Congress' statutory enlargements of habeas review. App. 6a. Yet, petitioners' argument is not that their claims are encompassed by the Suspension Clause because of statutory enlargements made over the years, but rather, that the Suspension Clause has historically covered the types of claims raised in this case. The opinion's reference to the potential for an "irrational ratchet" is thus based on the mistaken assumption that petitioners are seeking review in excess of what the Suspension Clause has historically protected. App. 5a.

The court of appeals' conclusion that the Suspension Clause, as originally understood, would not cover petitioners' claims is based on the failure to distinguish between the Suspension Clause's use in post-conviction criminal cases (where there has been prior review by another court), and the Suspension Clause's use in cases where, as here, the petitioner challenges *executive* detention (where there has been no prior review by a judicial tribunal). The other circuits to address this issue have rejected the use of habeas cases in the criminal context as the proper measure of the scope of review guaranteed by the Suspension Clause in immigration cases. *See, e.g., Mayers*, 175 F.3d at 1296 n.7; *Henderson*, 157 F.3d at 120; *Goncalves*, 144 F.3d at 118 n.8. *See generally Shah*, 1999 WL 493681, at *3-*4. The other circuits recognized that the historic purpose of the Suspension Clause was precisely to challenge executive detention "without judicial trial," *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring); *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring) ("[t]he traditional Great Writ was largely a remedy against executive detention."). This Court has specifically cautioned against conflating habeas cases in the criminal context with cases where there has been no prior judicial review, specifically citing immigration cases as an example. *See, e.g., Sunal v. Large*, 332 U.S. 174, 177 & n.3 (1947) (a direct appeal "could have been taken" and "[w]e therefore lay to one side [immigration] cases such as *Bridges v. Wixon*, 326 U.S. 135 [(1945)] . . . where the order of the agency . . . was not subject to judicial review.").

The voluminous and specific body of habeas law in the immigration context shows that the scope of constitutionally mandated habeas review for immigrants has never been limited in the restrictive manner suggested by the court of appeals. This Court and the lower courts

have traditionally exercised habeas jurisdiction to ensure that both the initial finding of deportability and the denial of discretionary relief complied with the Constitution and the governing immigration statutes. This habeas review occurred even under the 1891 and 1917 Immigration Acts, where the only "judicial intervention" permitted was that "required by the Constitution," and was, by definition, constitutionally mandated. *Heikkila v. Barber*, 345 U.S. 229, 234-35 (1953). *See, e.g., United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957); *Mahler v. Eby*, 264 U.S. 32, 44-45 (1924). *See Henderson*, 157 F.3d at 120 ("for at least one hundred years the courts have reviewed the executive branch's interpretation of the immigration laws, and have deemed such review to be constitutionally mandated"). *See also Mayers*, 175 F.3d at 1299-1300; *Sandoval*, 166 F.3d at 237.[15]

The Seventh Circuit did not cite any immigration habeas decisions, or even any decision involving executive detention, but nonetheless held that petitioners' claims were not encompassed within the scope of review over deportation orders guaranteed by the Suspension Clause. The potentially far-reaching implications of the court's constitutional analysis and the divergence of its holding from six other circuits warrants plenary review.

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[15] In *Accardi* the Court reviewed in habeas corpus the "refusal to exercise" discretion over the dissenters' objection that habeas review did not extend to the denial of discretionary relief. *See Accardi*, 347 U.S. at 269 (Jackson, J., dissenting).

III. On the Merits, the Court Should Grant the Writ, Vacate the Judgment and Remand to the Court of Appeals for Further Consideration in Light of *Martin v. Hadix*, or, in the Alternative, Grant Plenary Review to Resolve the Circuit Conflict Over Whether Section 440(d) Applies Retroactively.

A. The Ruling on Retroactivity Should be Vacated and Remanded.

After the court of appeals' decision, this Court decided *Martin v. Hadix*, ___ U.S. ___, 119 S. Ct. 1998 (1999), which once again emphasized the need to analyze a new statute closely to discern its temporal reach and the need to make a "common sense, functional judgment" of the statute's actual effect, based on "familiar considerations of fair notice, reasonable reliance, and settled expectations" when Congress' intent is not discernible. *Martin*, 119 S. Ct. at 2006. *Martin* is the fourth Supreme Court decision in recent years to address and reject sweeping claims that new legislation should be interpreted retroactively. *See Lindh v. Murphy*, 521 U.S. 320 (1997); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

That "common sense, functional judgment" in *Martin* recognized that lawyers who had undertaken monitoring work in two complex class actions had a reasonable expectation that they would be compensated at prevailing market rates, as provided in court orders. When Congress enacted legislation capping the rates for such work, without specifying when the legislation should take effect, the Court applied the statute only to work done after its effective date. "To give effect to the [statute's] fee limitations, after the fact, would attach new legal consequences to completed conduct." 119 S. Ct. at 2000 (citation omitted).

The same "common sense, functional judgment" is called for here, because immigrants charged with criminal offenses often face immigration consequences as severe as the penal consequences, and consequently, many of the decisions made in the course of their criminal proceedings are made to avoid those harsh immigration consequences. Pre-AEDPA, longtime lawful permanent residents who served less than five years for their offenses could seek a waiver of deportation. If they prevailed on their waiver applications – and more than half of them did – they could remain in the country because they had demonstrated strong family ties here, hardship to family members if they were deported, evidence of rehabilitation, a solid employment history, a record of community service, and other favorable factors. *Pottinger v. Reno*, No. 97 CV 3217 JBW, 1999 WL 569823, at *3 (E.D.N.Y. July 30, 1999). Thus, many immigrants had reason to accept plea bargains that would allow them to remain eligible for Section 1182(c) relief (and prosecutors and defense counsel structured pleas to achieve that result). The fact that these immigrants were subject to deportation before Section 440(d) was enacted misses the point. Deportation was not mandatory, as it would be if Section 440(d) applied retroactively.

Martin v. Hadix compels detailed consideration of which statutory provisions are relevant for determining congressional intent when explicit language is lacking, as well as a determination of the specific action that Congress intended to affect and whether the legislative change upset settled expectations. Under *Martin*, the courts must undertake more searching consideration of the practical consequences of a change in the law. Because the court of appeals did not conduct such an intensive review, but simply assumed that immigrants do not rely on the availability of Section 1182(c) relief, the opinion

should be vacated and remanded for reconsideration in light of *Martin v. Hadix*.

B. In the Alternative, Plenary Review is Warranted.

As laid out in *Landgraf*, and further explained in *Lindh*, the first step in any analysis of whether a statute should apply only prospectively is whether Congress, explicitly or by negative implication, directed that it should. In the five circuits that differ with the Seventh Circuit, the courts recognized that Congress had precisely described whether it wanted related provisions to apply retroactively and if so the degree of retroactivity it wanted. Accordingly, the other circuits all properly found that the lack of any such language in Section 440(d) was significant. *See Shah*, 1999 WL 493681, at *4; *Mayers*, 175 F.3d at 1302-03; *Sandoval*, 166 F.3d at 241; *Henderson*, 157 F.3d at 129-30; *Goncalves*, 144 F.3d at 128-31. The absence of any retroactive language in Section 440(d) reflected Congress' deliberate decision not to attach a "new legal consequence[ ]" or "new disability" to crimes that were not disqualifying before Section 440(d) was enacted. *Landgraf*, 511 U.S. at 269-70. The court of appeals in this case, in contrast, concluded that no inference could be drawn from Section 440(d)'s silence because it believed, incorrectly, that AEDPA contained some provisions that are expressly prospective, but others that are expressly retroactive, thereby negating any inference from the silence in Section 440(d). In fact, however, *all* of the provisions examined by the court of appeals are retroactive to some degree and therefore *do* permit a negative inference about Congress' intent in not specifying any retroactive effect for Section 440(d). The court of appeals erred, therefore, in holding Section 440(d) to be fully retroactive, particularly when just such a provision was

proposed in the Senate and not enacted. *See Goncalves*, 144 F.3d at 131-33.

IV. The Court of Appeals' Equal Protection Analysis Also Warrants Review.

The BIA held in *In re Fuentes-Campos*, Int. Dec. No. 3318, 1997 WL 269368 (BIA May 14, 1997), that AEDPA 440(d) disqualifies certain "deportable" aliens from receiving Section 1182(c) relief, but permits "excludable" aliens who have committed the identical crimes to apply for such relief. The court of appeals erred in finding that the differing treatment of deportable and excludable aliens was rational and did not violate equal protection, when the only difference between the two groups is that the latter have traveled abroad (even for a day), and are seeking relief in an exclusion hearing.

The court of appeals' equal protection analysis conflicts with a long line of circuit authority first set forth in the Second Circuit's decision in *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976), which the INS long ago accepted as the appropriate national rule. *See In re Silva*, 16 I & N Dec. 26 (BIA 1976). The principle in *Francis* and its progeny is that Section 1182(c) relief may not be conditioned on the fact that an alien has taken a brief trip abroad.[16]

The court of appeals concluded, however, that Section 440(d) did not violate the *Francis* principle because Congress wanted to provide deportable immigrants with criminal convictions an incentive to leave the country voluntarily. App. 12a. That justification – not articulated by Congress – is irrational. In fact, when AEDPA went into effect, the INS itself did not believe AEDPA 440(d) was intended to draw a distinction between deportable

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[16] *But see DeSousa*, 1999 WL 643171; *Jurado-Gutierrez*, 1999 WL 637038; *Estrada-Torres v. U.S.*, 179 F.3d 776 (9th Cir. 1999).

and excludable aliens, and specifically argued to the BIA that to draw such a distinction would render the statute unconstitutional. *See Fuentes-Campos*, 1999 WL 269368, at *17. In any event, the court of appeals' hypothetical justification for the statute cannot save it. If the purpose of the statute was to induce resident aliens to leave the country, then the statute is wholly irrational as applied to aliens, like LaGuerre and Avelar-Cruz, who were already in deportation proceedings when AEDPA went into effect, and thus, could not have been influenced by the possibility that Section 1182(c) relief might be available in exclusion proceedings. Morever, most immigrants with criminal convictions are, by statutory directive, put into deportation proceedings while they are in prison or upon their release, *see* 8 U.S.C. 1252(a)(2) (1994), and cannot leave the country until their proceedings conclude.

CONCLUSION

Petitioners respectfully submit that the petition for writ of *certiorari* should be granted and the judgment vacated and remanded to the court of appeals, or alternatively, the case accepted for plenary review.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

JOSE MARTIN AVELAR-CRUZ and GARY LAGUERRE,

Petitioners,

v.

JANET RENO, as Attorney General of the United States; DORIS MEISSNER, as Commissioner of the Immigration and Naturalization Service; BRIAN PERRYMAN, as Chicago District Director of the Immigration and Naturalization Service; and the IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

In the

United States Court of Appeals

for the Seventh Circuit

No. 98-1954

GARY LAGUERRE,

Petitioner-Appellant,

v.

JANET RENO, *et al.*,

Respondents-Appellees.

No. 98-2613

JOSÉ MARTIN AVELAR-CRUZ,

Petitioner-Appellee,

v.

JANET RENO, *et al.*,

Respondents-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 97 C 8225 and 98 C 1193 –
Suzanne B. Conlon, *Judge.*

ARGUED OCTOBER 29, 1998 – DECIDED DECEMBER 22, 1998

Before POSNER, *Chief Judge*, and HARLINGTON WOOD, JR., and MANION, *Circuit Judges.*

POSNER, *Chief Judge*. We have consolidated for argument and decision two immigration cases that present overlapping issues. In one, Gary LaGuerre sought habeas corpus in federal district court under 28 U.S.C. § 2241, challenging the refusal of the Board of Immigration Appeals to consider his application for a waiver of deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994 ed.). Section 212(c) (since repealed and replaced by a new, but basically similar, section, § 240A(b), 8 U.S.C. § 1229b(o)) grants the Attorney General (or the Attorney General's delegates, such as the Board of Immigration Appeals) discretion to waive deportation because of extraordinary hardship to the deportee or his family, or other exceptional circumstances. *Lovell v. INS*, 52 F.3d 458, 461 (2d Cir. 1995). LaGuerre had been ordered deported because he had been convicted of certain drug-related offenses, and section 440(d) of the Antiterrorism and Effective Death Penalty Act, enacted in 1996, amended section 212(c) of the Immigration and Nationality Act to bar waivers of deportation for aliens ordered deported on the basis of such convictions. The Act was passed while the deportation proceedings against LaGuerre were pending; nevertheless the Board of Immigration Appeals held that section 440(d) applied to him. The district court agreed, and LaGuerre appeals.

The other case differs primarily in that the alien, José Martin Avelar-Cruz, prevailed in the district court by convincing the judge that section 440(d) denies equal protection of the laws because it bars waiver only for aliens deportable on the basis of particular offenses and not for aliens excludable from the United States on the

basis of the same offenses. If, before deportation proceedings had been instituted against Avelar-Cruz, he had left the United States and then tried to reenter, and exclusion proceedings had been instituted against him, he could, if ordered excluded, have applied for a waiver of exclusion. The Department of Justice has appealed from the judgment in Avelar-Cruz's case.

The issues common to both cases are whether the district court had jurisdiction and if so whether section 440(d) applies to proceedings that were pending when it was enacted. A third issue, presented only in Avelar-Cruz's case, is whether if there is jurisdiction and section 440(d) is applicable to this case, the section is unconstitutional.

Until 1961, the mode of judicial review of deportation orders was by habeas corpus, or, after 1952, by declaratory judgment actions, in federal district courts. *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955); *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954); *Heikkila v. Barber*, 345 U.S. 229 (1953). In 1961 Congress made review of such orders by the courts of appeals, without preliminary recourse to the district courts, the exclusive method of judicial review. Immigration and Nationality Act, § 106, 8 U.S.C. § 1105a (1994 ed.). The purpose of consolidating review in the courts of appeals and thus cutting out the district courts was to thwart the dilatory tactics frequently employed by the lawyers for deportable aliens. *Foti v. INS*, 375 U.S. 217, 225-26 (1963). The right of habeas corpus was preserved, however, in section 106(a)(9) of the Act, 8 U.S.C. § 1105a(a)(9) (1970 ed.) (later renumbered (10)); *Foti v. INS*, *supra*, 375 U.S. at 231 n. 19, and courts have struggled to reconcile this provision, which permits the alien

to proceed in district court, see 28 U.S.C. § 2241(a), with the overall statutory purpose. E.g., *Galaviz-Medina v. Wooten*, 27 F.3d 487, 489-92 (10th Cir. 1994); *Williams v. INS*, 795 F.2d 738, 743-45 (9th Cir. 1986). The best view is that the provision was intended to be limited to situations in which the alien was unable to obtain judicial review under the new statutory procedure, and should be interpreted accordingly. E.g., *Bothyo v. Moyer*, 772 F.2d 353, 355-56 and n. 1 (7th Cir. 1985); see *Kwok v. INS*, 392 U.S. 206 (1968); *Singh v. Waters*, 87 F.3d 346, 349 (9th Cir. 1996).

Thirty-five years later, section 440(a) of the Antiterrorism and Effective Death Penalty Act amended section 106 to provide that a "final order of deportation against an alien who is deportable by reason of having committed a [drug] offense . . . shall not be subject to review by any court." And section 401(e) also repeals section 106(a)(10) of the 1961 Act, the provision preserving a limited right to apply for habeas corpus. Nevertheless, several decisions in other circuits, as well as dicta in our decisions in *Chow v. INS*, 113 F.3d 659, 668-69 (7th Cir. 1997), and *Turkhan v. INS*, 123 F.3d 487, 490 (7th Cir. 1997), hold that the closing of the door to judicial review in section 440(a) does not apply to habeas corpus. *Henderson v. INS*, 157 F.3d 106, 122 (2d Cir. 1998); *Goncalves v. Reno*, 144 F.3d 110, 118-23 (1st Cir. 1998); *Magana-Pizano v. INS*, 152 F.3d 1213, amended, 159 F.3d 1217 (9th Cir. 1998) (per curiam). These courts point out that Congress did not amend the basic federal habeas corpus statute, 28 U.S.C. § 2241, which is broadly enough worded to encompass persons detained under an order of deportation while awaiting the execution of the order; and they worry that if section 440(a) did close the door to habeas corpus it

might violate the provision of the Constitution that forbids suspending habeas corpus other than in times of war or rebellion. U.S. Const. art. I, § 9, cl. 2. The Eleventh Circuit, however, has taken the opposite position, holding that section 440(a) does abrogate habeas corpus for aliens subject to it. *Richardson v. Reno*, No. 98-4230, 1998 WL 850045 (11th Cir. Dec. 9, 1998).

We doubt that the suspension clause requires preserving habeas corpus as a vehicle for challenging final orders of deportation in cases in which the jurisdiction of the immigration authorities over the alien is not in question. At the time the Constitution was enacted, habeas corpus was an extremely limited remedy. It lay only to test the jurisdiction of whatever governmental body or officer was detaining the applicant. E.g., *Felker v. Turpin*, 518 U.S. 651, 663 (1996); Paul M. Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 *Harv. L. Rev.* 441, 465-74 (1963). Over the years, Congress has authorized a much broader use of habeas corpus; but it cannot be that curtailing an *optional* statutory enlargement violates the suspension clause. That would create an irrational ratchet. Habeas corpus could always be enlarged, but once enlarged could not be returned to its previous, less generous scope without a constitutional amendment. Once this was understood, there would be few if any further enlargements. There can be no doubt that the applicants for habeas corpus in the present cases are detained pursuant to valid orders issued by the responsible authorities. The issue they wish to press – the issue of whether they are entitled to ask for discretionary relief from these orders – does not raise

doubts about the jurisdiction of the Immigration and Naturalization Service over them.

We are suggesting not that the meaning of habeas corpus in the suspension clause was set in stone in 1787, an issue left open in *Felker v. Turpin, supra*, 518 U.S. at 664, but only that the meaning of the *constitutional* term does not move in lockstep with changes in the meaning of the *statutory* term. *Lindh v. Murphy*, 96 F.3d 856, 867-68 (7th Cir. 1996) (en banc), rev'd on other grounds, 117 S. Ct. 2059 (1997); see also *Yang v. INS*, 109 F.3d 1185, 1195 (7th Cir. 1997). The Sixth Amendment guarantees the right to counsel; but if Congress passed a statute entitling every federal criminal defendant to have three lawyers, it would not mean that the Sixth Amendment entitled every federal criminal defendant to three lawyers.

These considerations make us doubt that concerns about the suspension clause played any role in the omission from section 440(a) of an explicit reference to 28 U.S.C. § 2241. On the contrary, we cannot think of any theory under which Congress would have wanted section 440(a) to limit only review in the courts of appeals and leave intact whatever powers the old section 106(a)(10) – which, remember, section 440(a) repealed – had conferred on the district courts. The purpose of the new section was not to restore the pre-1961 regime and slow down deportation by creating two layers of judicial review, rather than one as under the regime that prevailed for all deportees between 1961 and 1996. The purpose was to curtail and speed up judicial review of deportation orders directed against disfavored classes of criminals, such as drug offenders. If the effect of the new provision was, as our petitioners and the cases we have cited believe, to

shift judicial review to the district court, followed of course by appeal to this court, then Congress enlarged judicial review for these deportees (and for no others! – the others remain under the 1961 procedure, which confines them to the courts of appeals except where direct review by those courts is unavailable) by allowing them to challenge their deportation in two courts rather than one.

Against this the petitioners argue that judicial review by means of habeas corpus is narrower than the direct review in this court under the 1961-1996 regime, being limited to questions of law, so that, provided there is at least *some* evidence to support the order, the court will not disturb it. Under the former regime, the court (just the court of appeals, remember) reviewed for substantial evidence as well. *Dashto v. INS*, 59 F.3d 697, 703 (7th Cir. 1995) [sic] *Paredes-Urrestarazu v. U.S. INS*, 36 F.3d 801, 821 (9th Cir. 1994); *Gouveia v. INS*, 980 F.2d 814, 818 (1st Cir. 1992). This distinction was pointed out by the Supreme Court in *Heikkila v. Barber, supra*, 345 U.S. at 235-36, and has been repeated in subsequent cases. E.g., *Goncalves v. Reno, supra*, 144 F.3d at 124-25. But *Heikkila* was decided in 1953, at a time when habeas corpus was conceived much more narrowly than later on, leaving one to wonder just how much practical difference there would be between the two modes of review today. Habeas corpus is available under 28 U.S.C. § 2241 for anyone held in custody in violation of federal law, including section 212(c) of the Immigration and Nationality Act and its successor provision, and the alien who claims that the Board of Immigration Appeals abused its discretion in failing to grant him relief under that section might be

thought to be arguing that the BIA had violated the section. Cf. *Goncalves v. Reno, supra,* 144 F.3d at 125 n. 17. (Various statutes culminating in the Antiterrorism and Effective Death Penalty Act have curtailed the habeas corpus remedy for persons detained pursuant to a conviction, but an order of deportation is not a conviction.) If so, then Congress accomplished nothing toward its aim of curtailing judicial review if review on habeas corpus survived the door-closing impact of section 440(a). Maybe less than nothing, if by closing the door to review by the courts of appeals Congress simultaneously opened the door to review by the district courts *followed by* review by the courts of appeals. If not – if judicial review would be significantly narrower under habeas corpus than under section 106 – we have the anomaly of two tiers of identical review, since in cases when all the district court considers is a question of law, our review is plenary.

We conclude that for the class of aliens encompassed by section 440(a), judicial review by means of habeas corpus did not survive the enactment of that section. It does not follow that judicial review of the class of deportation orders illustrated by the orders in these two cases has been totally extinguished. The government does not argue that. Mindful of the presumption that executive resolutions of constitutional issues are judicially reviewable, *Webster v. Doe,* 486 U.S. 592, 603 (1988); *Czerkies v. U.S. Dept. of Labor,* 73 F.3d 1435 (7th Cir. 1996) (en banc); *Marozsan v. United States,* 852 F.2d 1469 (7th Cir. 1988) (en banc), it urges us to read into section 440(a) an exception that will allow the review of such issues. This is the road we started down in *Yang v. INS, supra,* 109 F.3d at 1192, is the approach of the Third Circuit, *Morel v. INS,* 144 F.3d

248 (3d Cir. 1998), and now of the Eleventh, *Richardson v. Reno, supra,* 1998 WL 850045 at *28-29, has been acknowledged as a possible approach by the Tenth, *Fernandez v. INS,* 113 F.3d 1151, 1155 (10th Cir. 1997), and was favored by the Second Circuit in *Henderson v. INS, supra,* 157 F.3d at 119 n. 9, although that court felt constrained by Second Circuit precedent to eschew the approach in favor of preserving habeas corpus. If, as we believe in agreement with the government, the deportee can seek review of constitutional issues in the court of appeals directly, as under the prior regime governing judicial review of deportation, then the layering of judicial review proposed by the petitioners is avoided, judicial review is curtailed as Congress intended, but enough of a safety valve is left to enable judicial correction of bizarre miscarriages of justice. These are unlikely but, given the unpopularity of aliens in some quarters (which has led the Supreme Court to classify them as a particularly vulnerable group for purposes of judicial review of their equal protection claims, *Bernal v. Fainter,* 467 U.S. 216, 219 (1984)), not unthinkable. Suppose the Board of Immigration Appeals ordered an alien deported on the basis of a criminal conviction that it knew had been vacated, but it didn't care because the alien was black. We have expressed doubt that Congress intended to forbid such orders to be challenged in court under section 440(a). *Yang v. INS, supra,* 109 F.3d at 1192.

Morel and *Richardson,* in holding as do we today that direct review remains available under section 440(a) for aliens wishing to challenge their deportation on constitutional grounds, necessarily imply (and *Richardson* makes explicit) the rejection of habeas corpus in all cases in

which direct review is possible, as there is no question of Congress's power to prescribe a habeas corpus substitute. *Swain v. Pressley*, 430 U.S. 372, 381 (1976); *United States v. Hayman*, 342 U.S. 205 (1952); *Blair-Bey v. Quick*, 151 F.3d 1036, 1042-43 (D.C. Cir. 1998); cf. *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998); *In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997). By the same token, if for reasons beyond the alien's control he could not have raised his substantial constitutional issue in this court by seeking review here directly under section 440(a), he may be able to proceed in the district court under 28 U.S.C. § 2241. This we need not decide; such cases will be very rare, and these two cases are not among them. These petitioners brought their actions in the wrong court under the wrong statute. And it is now too late for them to file a petition for review in the right court, 8 U.S.C. § 1105a(a)(1) (1994); *Stone v. INS*, 514 U.S. 386, 406 (1995); *Torres v. INS*, 144 F.3d 472, 473 (7th Cir. 1998); *Hadera v. INS*, 136 F.3d 1338, 1341 (D.C. Cir. 1998), that is, in this court. But we shall add, lest they feel that we've tripped them up on a technicality, that they would not have prevailed even if they hadn't dropped the jurisdictional ball. The Board of Immigration Appeals was right that the abolition of waiver of deportation for the class of deportees that includes these two petitioners applies to pending cases, and so to the petitioners.

Several sections of the Antiterrorism and Effective Death Penalty Act that curtail the rights of aliens are expressly prospective, §§ 440(f), 421(b), 435(b), and two are expressly retroactive, §§ 401(f), 413(g), but section 440(d) is neither. This makes it impossible for us to determine as a matter of legislative intent whether that section

is to be applied prospectively or retroactively, *Chow v. INS, supra,* 113 F.3d at 665, and so we need a rule that determines decision when legislative meaning is opaque. The relevant rule is that statutes which change primary (out of court) duties, for example statutes that impose new tort liabilities, are applied prospectively, while statutes that change merely procedures are applied retroactively. *Lindh v. Murphy,* 117 S.Ct. 2059, 2062-63 (1997); *Landgraf v. USI Film Products,* 511 U.S. 244 (1994); *Chow v. INS, supra,* 113 F.3d at 665; *Reyes-Hernandez v. INS,* 89 F.3d 490, 492 (7th Cir. 1996); *United States v. Certain Funds,* 96 F.3d 20, 24 (2d Cir. 1996). The reasoning behind this distinction is that people are much more likely to rely on substantive than procedural law. But this implies that when it is the kind of procedural change that does disturb reasonable expectations, the presumption in favor of retroactive application is reversed. Suppose a person facing deportation conceded deportability in reliance on having a good shot at a waiver of deportability. In that event, to abolish such waiver for his class of deportees after he had relied by forgoing a challenge to deportability would pull the rug out from under him. And in that case we have held that the abolition would not apply to him, would be prospective only. *Reyes-Hernandez v. INS, supra,* 89 F.3d at 492-93; see also *Yang v. INS, supra,* 109 F.3d at 1191-92; *Arevalo-Lopez v. INS,* 104 F.3d 100 (7th Cir. 1997); *In re Soriano,* Interim Decision No. 3289, p. 8, 1996 WL 426888 (BIA Feb. 21, 1997); but see *Kolster v. INS,* 101 F.3d 785, 789 (1st Cir. 1996); *Hincapie-Nieto v. INS,* 92 F.3d 27, 30 (2d Cir. 1996). There is no suggestion of such "mouse trapping" here. It would border on the absurd to argue that these aliens might have decided not to commit

drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation.

We may seem to have assumed that if the petitioners had filed a timely petition for review in this court, we could have decided the issue. The government argues that we could not have, since the issue is not constitutional. This would make the decision of the Board of Immigration Appeals regarding the domain of section 440(d) judicially unreviewable. It seems unlikely that Congress would have wanted the Board to have the final word on so pure and fundamental a question of law as when the statute went into effect. So maybe the door to judicial review has been left a little more ajar than we have suggested. *Yang v. INS, supra,* 109 F.3d at 1195-96; *Richardson v. Reno, supra,* 1998 WL 850045 at *28-29. But that is another question that we need not answer today.

We add, finally, that there is no merit to Avelar-Cruz's equal protection challenge. A rational and indeed sensible reason can readily be assigned to Congress's more lenient treatment of excludable as distinct from deportable aliens: it creates an incentive for deportable aliens to leave the country – which is after all the goal of deportation – without their having to be ordered to leave at the government's expense. To induce their voluntary departure, a little carrot is dangled before them, consisting of the opportunity to seek a waiver should they seek to return to the country and by doing so trigger exclusion proceedings.

This equal protection issue must not be confused with that in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), where the government was taking the irrational position that an alien who after coming to the United States had taken a trip abroad and returned and was then ordered deported was entitled to more consideration than one who had never taken a foreign trip after coming to the United States. That is different from the situation of an alien who seeks discretionary relief while he is still outside the United States.

The essential point, however, is that the petitioners initiated their actions in the wrong court. The judgment in LaGuerre's case is modified to base dismissal on want of jurisdiction, and the judgment in Avelar-Cruz's case is reversed with instructions to dismiss the action, also for want of jurisdiction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JOSE MARTIN AVELAR CRUZ, Petitioner, v. JANET RENO, as Attorney General of the United States; DORIS MEISSNER, as Commissioner of the Immigration and Naturalization Service; BRIAN PERRYMAN, as Chicago District Director of the Immigration and Naturalization Service; and the IMMIGRATION AND NATURALIZATION SERVICE, Defendants.	No. 98 C 1193 Suzanne B. Conlon, Judge

MEMORANDUM OPINION AND ORDER

Jose Martin Avelar-Cruz ("Avelar-Cruz") petitions for writ of habeas corpus pursuant to 28 U.S.C. § 2241, Art. I, § 9, cl. 2 of the Constitution, and 28 U.S.C. § 1331. He seeks review of a final order of deportation. Avelar-Cruz names Janet Reno, Attorney General of the United States; Doris Meissner, Commissioner of the Immigration and Naturalization Service ("the INS"); Brian Perryman,

Chicago District Director of the INS; and the INS, as respondents.

BACKGROUND

Avelar-Cruz is a twenty-five year old citizen of Mexico who entered the United States in 1975 without inspection. Avelar-Cruz became a temporary resident under the amnesty provisions of 8 U.S.C. § 1255a on September 25, 1987. On May 10, 1989, Avelar-Cruz became a lawful permanent resident alien.

On September 7, 1993, Avelar-Cruz was convicted of possession with intent to deliver and delivery of a controlled substance (each offense involving less than one gram of cocaine). He was sentenced to consecutive terms of three and four years in state prison. The INS subsequently issued an order to show cause alleging that Avelar-Cruz was deportable pursuant to 8 U.S.C. § 1251(a)(2)(A)(iii), as an alien convicted of an aggravated felony, and 8 U.S.C. § 1251(a)(2)(B)(i) as an alien convicted of a controlled substance violation.

In a deportation hearing before an immigration judge, Avelar-Cruz contested his deportability. The INS introduced certified copies of Avelar-Cruz' narcotics convictions. On June 20, 1994, the immigration judge found Avelar-Cruz deportable on both charges contained in the order to show cause. The immigration judge found Avelar-Cruz statutorily ineligible for a waiver under 8 U.S.C. § 1182(c) because Avelar-Cruz had not accumulated seven

years of domicile in the United States following his lawful admission.[1] Consequently, Avelar-Cruz was ordered deported to Mexico. On November 14, 1994, the Board of Immigration Appeals ("BIA") affirmed this decision.

Avelar-Cruz challenged this decision in the United States Court of Appeals for the Seventh Circuit. On June 27, 1995, the Seventh Circuit held that for purposes of a waiver under 8 U.S.C. § 1182(c), Avelar-Cruz' lawful domicile in the United States began on September 25, 1987 when he became a temporary resident. Therefore, the court granted Avelar-Cruz' petition for review and remanded the case to the BIA. *See Avelar-Cruz v. INS*, 58 F.3d 338, 341 (7th Cir. 1995). On February 7, 1996, the BIA remanded the proceedings to the immigration judge to adjudicate Avelar-Cruz' application for a waiver.

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). Section 440(d) of the AEDPA amended 8 U.S.C. § 1182(c) in part by making aliens who are "deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D)" ineligible for a waiver.

---

[1] Prior to enactment of the AEDPA, criminal aliens could seek a discretionary waiver of deportation under section 212(c) of the INA. Section 212(c) stated in relevant part:

> Aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General. . . .

8 U.S.C. § 1182(c).

On November 18, 1996, the immigration judge held that because of Avelar-Cruz' prior narcotics convictions, he was statutorily ineligible for a waiver under 8 U.S.C. § 1182(c) (as amended by AEDPA § 440(d)). The immigration judge ordered Avelar-Cruz deported to Mexico. On January 8, 1998, the BIA dismissed Avelar-Cruz' appeal, relying on the Attorney General's decision in *Matter of Soriano*, Interim Decision No. 3289, 1996 WL 426888 (BIA 1996; A.G. 1997). Based on this final order of deportation, the INS ordered Avelar-Cruz to report for deportation on February 26, 1998. On February 25, 1998, Avelar-Cruz filed this petition for writ of habeas corpus.

Avelar-Cruz is presently in the custody of the Immigration and Naturalization Service; he contends the immigration judge's retroactive application of § 440(d) of the AEDPA during his deportation hearing denied him due process and denied him his statutory right to apply for a waiver of deportation under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq. Avelar-Cruz also contends he has been denied equal protection as a result of the decision in *Matter of Fuentes-Campos*, Int. Dec. No. 3318, 1997 WL 269368 (BIA 1997) (§ 440(d) applies to deportation proceedings but not exclusion proceedings).

DISCUSSION

With the exception of the equal protection claim, this court recently addressed all the issues raised by Avelar-Cruz' petition in a similar case. *See Laguerre v. Reno*, 1998

WL 100238 (N.D. Ill. Feb. 17, 1998). Where the issues overlap, the court finds no reason to depart from its opinion in *Laguerre*.

I. JURISDICTION

The court must first address whether the jurisdictional restrictions enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), P.L. 104-208, Div. C, 110 Stat. 3009 (1996), deprive it of subject matter jurisdiction over Avelar-Cruz' petition for writ of habeas corpus. Avelar-Cruz alleges jurisdiction under 28 U.S.C. § 2241, Art. I, § 9, cl. 2 of the Constitution, and 28 U.S.C. § 1331. Respondents contend that section § [sic] 242(g) of the INA, 8 U.S.C. § 1252(g), as amended by § 306(a) of IIRIRA, requires dismissal of the petition for lack of subject matter jurisdiction. Avelar-Cruz asserts, in essence, that despite IIRIRA's significance for judicial review of final orders of deportation, the court retains jurisdiction to consider the merits of habeas petitions pursuant to § 2241 because Congress did not affirmatively repeal habeas review under that statute. Alternatively, Avelar-Cruz invokes jurisdiction under the Suspension Clause of Article 1, section 9, clause 2 of the Constitution.

A. LEGISLATIVE BACKGROUND

The jurisdictional provisions of the INA have undergone a rapid succession of legislative amendments, all aimed at curtailment of federal court jurisdiction over INS administrative decisions and adjudications. In particular, Congress has taken steps apparently intended to

limit federal court jurisdiction over petitions for habeas corpus involving INS matters. First, Congress enacted the AEDPA on April 24, 1996. Section 404(e) of the AEDPA eliminated the INA provision governing habeas corpus review of deportation proceedings. Formerly, INA § 106(a)(10) provided: "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." 8 U.S.C. § 1105(a)(10) (1994). Section 404(a) of the AEDPA replaced § 106(a)(10) with the following provision: "Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), (D) [of the INA] . . . shall not be subject to review by any court." 110 Stat. 1214, 1276-77.

Second, on September 30, 1996, Congress enacted IIRIRA. Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996). IIRIRA repealed § 106 of the INA and replaced it with a new § 242 entitled "Judicial Review of Orders of Removal." IIRIRA § 306, codified at 8 U.S.C. § 1252.[2] Specifically, IIRIRA § 306(a)(2)(C) replaced AEDPA § 404(a). The new provision reads: "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense . . . . " INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

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[2] IIRIRA replaces the familiar term "deportation" with the term "removal."

B. APPLICABLE JURISDICTIONAL PROVISION

Instead of relying on IIRIRA § 306(a)(2)(C), respondents premise their subject matter jurisdiction argument on the effect of IIRIRA's broad jurisdictional provision found in § 306(a). Section 306(a) creates a new section 242(g) of the INA, entitled "Exclusive Jurisdiction." 8 U.S.C. § 1252(g). The new section provides:

> Except as provided in this section and notwithstanding any other provisions of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

8 U.S.C. § 1252(g). Avelar-Cruz does not directly challenge respondents' argument that the language of this section encompasses his claims. Rather, Avelar-Cruz raises the issue whether his petition is governed by § 242(g), as opposed to IIRIRA's transitional rules, which the statute makes applicable to persons in deportation proceedings commenced before April 1, 1997. *See* IIRIRA § 309.

Avelar-Cruz' argument raises a question of statutory construction: whether IIRIRA § 242(g) or IIRIRA's transition provisions, specifically § 309(c)(4)(G), govern the court's subject matter jurisdiction over the petition. A resolution of this question depends on both the relative effective dates of IIRIRA's statutory provisions and on their substantive scope. In general, the effective date of IIRIRA's amendments is "the first day of the first month beginning more than 180 days after the date of enactment

[September 30, 1996]" or April 1, 1997. § 309(a). Yet, § 309(c) creates transitional rules delaying implementation of its amendments for aliens in exclusion or deportation proceedings before April 1, 1997. In addition, § 309(a) excepts §§ 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) from the general effective date. The effective date for § 242(g) is found in § 306(c)(1). The section, as amended by technical corrections on October 11, 1996, Pub. L. 104-302, 110 Stat. 3656, 3657, provides:

> (c) EFFECTIVE DATE
>
> (1) IN GENERAL – Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection(a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

IIRIRA § 306(c)(1). Although manifesting a clear intent that the provision be applied retroactively, Congress failed to provide a date for § 242(g). Thus, the question arises whether § 242(g) was meant to take effect on the date of IIRIRA's enactment, as opposed to April 1, 1997.

The Seventh Circuit resolved this issue in *Lalani v. Perryman*, 105 F.3d 334 (7th Cir. 1997) (*per curiam*). In *Lalani*, the government argued that § 242(g) took effect on the date of enactment and thus deprived the court of jurisdiction. The Seventh Circuit rejected this construction of the statute. The court recognized that to interpret the statute in this manner would render meaningless "the provisions of the IIRIRA [the transition rules] deferring

application of its procedures for six months . . . because [the court] would have no jurisdiction in all cases immediately." *Id.* at 336. Noting that § 306(c) refers back to § 309, the Seventh Circuit held that § 242(g) would not take effect until April 1, 1997 – the general effective date. Finally, unlike the other subsections, § 242(g) applies retroactively to past and pending deportation proceedings.

IIRIRA's transition provisions delay the implementation of IIRIRA's amendments governing judicial review, including § 306(a)(2)(C). *See Turkhan v. INS*, 123 F.3d 487, 489 (7th Cir. 1997) ("Section 309 of the II[RI]RA . . . makes these new judicial review provisions inapplicable to aliens who are in deportation proceedings [before] April 1, 1997"); *see also Yang v. INS*, 109 F.3d 1185, 1191 (7th Cir. 1997) ("the II[RI]RA covers removal proceedings begun during or after . . . April"). The transition provisions state, in relevant part:

> (c) TRANSITION FOR ALIENS IN PROCEEDINGS –
>
> > (1) GENERAL RULE THAT NEW RULES DO NOT APPLY – Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before [April 1, 1997] –
> >
> > > (A) the amendments made by this subtitle shall not apply, and
> > >
> > > (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.
> >
> > . . . .

> (4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW – In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act [after October 30, 1996] notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary –
>
> . . . .
>
> (G) there shall be no appeal in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect on the date of enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

IIRIRA § 309(c). Provided Avelar-Cruz satisfies the criteria set forth above, he may benefit from the delayed implementation of the IIRIRA's more restrictive judicial review provisions.

Avelar-Cruz meets the statutory timing requirements for application of the transitional rules governing judicial review. First, his deportation proceedings commenced before April 1, 1997. Second, the deportation order became final after October 30, 1996. On remand from the

Seventh Circuit, the BIA ultimately dismissed Avelar-Cruz' appeal on January 8, 1998. On similar facts, courts have determined that § 309(c)(4)(G) is applicable. *See, e.g., Turkhan*, 123 F.3d at 488-89 (BIA denied motion to reopen on May 9, 1997); *Sandoval v. Reno*, Civ. No. 97-7289, 1997 U.S. Dist. Lexis 20976, *12-15 (E.D. Pa. Dec. 30, 1997) (BIA dismissed appeal on July 16, 1997). Finally, because the transition rules only supersede contrary provisions of the pre-IIRIRA law, § 440(a) of the AEDPA (INA § 106(a)(10)) would also apply. *See Turkhan*, 123 F.3d at 489.

Respondents urge that application of § 242(g) is required and it precludes habeas review of Avelar-Cruz' petition. The difficulty with this argument is that if § 242(g) operated to divest the district court of jurisdiction over Avelar-Cruz' habeas petition, it would render superfluous IIRIRA's specific provision governing jurisdiction for review of criminal alien deportations. *See* § 306(a)(2)(C), codified at 8 U.S.C. § 1252(a)(2)(C). In addition, retroactive application of § 242(g) would thwart application of the related transition provision for aliens in deportation proceedings. *See* § 309(c)(4)(G). Two familiar maxims of statutory construction support application of the specific IIRIRA provision. First, the specific takes precedence over the general. *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 420 (7th Cir. 1993). Second, a court is to give effect to all statutory provisions whenever possible. *See In re Lifschultz Fast Freight Corp.*, 63 F.3d 621, 628 (7th Cir. 1995); *see also United States v. Wagner*, 29 F.3d 264, 266 (7th Cir. 1994).

IIRIRA § 306(a)(2)(C) is entitled "Orders Against Criminal Aliens" and is located in a subsection of INA

§ 242 entitled "Matters Not Subject to Judicial Review." The language of this subsection mirrors the language of § 242(g). For instance, both provisions contain the core phrase "notwithstanding any other provision of law, no court shall have jurisdiction." Just as § 242(g) seems gauged to divest federal courts of jurisdiction over all judicial review of administrative decisions or actions of the attorney general, including habeas corpus petitions, § 306(a)(2)(C) seems to divest federal courts of all judicial review of criminal alien deportations under enumerated sections. If the scope of § 242(g) is as broad as respondents claim, its application would render § 306(a)(2)(C) meaningless. Thus, in order to give full effect to the precise language of § 306(a)(2)(C), and the related transition provision, § 309(c)(4)(G), the court finds Avelar-Cruz' claims beyond the scope [sic] § 242(g). Avelar-Cruz' petition seeks habeas review of a final order of deportation based on his criminal alien status pursuant to INA §§ 241(a)(2)(A)(iii) and 241(a)(2)(B)(i). His petition is only incidentally directed at a "decision or action of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." § 242(g). Accordingly, the broad terms of § 242(g) do not govern this case.

C. JURISDICTION PURSUANT TO § 2241

The next inquiry is whether the court retains subject matter jurisdiction over Avelar-Cruz' petition pursuant to 28 U.S.C. § 2241, despite the jurisdiction narrowing language of both § 440(a) and its IIRIRA counterpart, § 309(c)(4)(G). No federal appellate court has yet directly reached this issue. A number of appellate courts have addressed the constitutionality of § 440(a)'s restrictions

on appellate review. In concluding that Congress could constitutionally divest the appellate courts of jurisdiction over direct appeals from final deportation orders, a number of courts have assumed the continuing availability of federal habeas relief. *See, e.g., Chow v. INS*, 113 F.3d 659, 669 (7th Cir. 1997) ("Thus, we cannot say that section 106(a) of the INA is *Chow*'s only avenue of judicial review, and because other avenues for relief remain open, we hold that section 440(a) does not violate *Chow*'s due process rights"); *Kolster v. INS*, 101 F.3d 785, 790-91 (1st Cir. 1996); *Hincapie-Nieto v. INS*, 92 F.3d 27, 30-31 (2d Cir. 1996); *Salazar-Haro v. INS*, 95 F.3d 309, 311 (3d Cir. 1996). Further, a growing majority of district courts across the nation, including this court, have already concluded that federal habeas relief remains available under § 2241. *Gutierrez-Martinez*, ___ F. Supp. ___, 1998 WL 7459 (N.D. Ga. Jan. 8, 1998); *Morisath v. Smith*, No. C 97-12392, 1997 WL 797664 (W.D. Wash. Dec. 23, 1997); *Mojica v. Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997); *Ozoanya v. Reno*, 968 F. Supp. 1 (D.D.C. 1997); *Vargas v. Reno*, 966 F. Supp. 1537 (S.D. Cal. 1997); *Yesil v. Reno*, 958 F. Supp. 828 (S.D.N.Y. 1997), *reconsid. den.*, 973 F. Supp. 372 (S.D.N.Y. 1997); *Dunkley v. Perryman*, No. 96 C 3570, 1996 WL 464191 (N.D. Ill. Aug. 7, 1996); *Mbiya v. INS*, 930 F. Supp. 609 (N.D. Ga. 1996); *Powell v. Jennifer*, 937 F. Supp. 1245 (E.D. Mich. 1996). Finally, in *Sandoval*, the district court reached the identical conclusion with respect to IIRIRA § 309(c)(4)(G). 1997 U.S. Dist. Lexis 20976.

The conclusion that habeas jurisdiction persists under § 2241 is mandated, in large part, by the Supreme Court's recent opinion in *Felker v. Turpin*, ___ U.S. ___, 116 S. Ct. 2333 (1996). In *Felker*, the Supreme Court addressed

the effects of AEDPA's gatekeeping mechanism on the Court's original jurisdiction over habeas petitions. The challenged AEDPA provisions were designed to restrict the filing of successive habeas petitions. The Supreme Court premised its analysis of the AEDPA provision on the presumption against repeal of habeas corpus jurisdiction by implication. *Ex parte Yerger*, 8 Wall. 85, 19 L.Ed. 332 (1869). Finding no affirmative mention of the Court's authority to hear habeas petitions in Title I of the AEDPA or in the specific section restricting the Supreme Court's appellate jurisdiction, the Court declined to find a repeal of its jurisdiction over original petitions pursuant to § 2241 or § 2254.

Felker's presumption against repeal by implication compels the conclusion that the general language of § 440(a) does not eliminate subject matter jurisdiction over habeas corpus petitions pursuant to § 2241. *See, e.g., Yesil*, 958 F. Supp. at 838 ("Sections 401 and 440 of the AEDPA do not state that they repeal or amend section 2241; indeed, they do not mention section 2241 at all"); *Mojica*, 970 F. Supp. at 160 ("The AEDPA does not amend, or even mention, section 2241 of Title 28"). *Felker* applies with even greater force in the context of § 309(c)(4)(G) because Congress substituted the narrower term "appeal" for § 440(a)'s "review." *See Sandoval*, 1997 U.S. Dist. Lexis at 22-23; *see also Mojica*, 970 F. Supp. at 160. Accordingly, neither § 440(a), nor § 309(c)(4)(G), operates to preclude this court's exercise of jurisdiction over Avelar-Cruz' petition pursuant to § 2241.

Finally, the court must determine whether Avelar-Cruz meets the jurisdictional requirement of § 2241. First, Avelar-Cruz must be "in custody under or by color of the

authority of the United States." 28 U.S.C. § 2241(c)(1). It is undisputed Avelar-Cruz is presently in INS custody. Second, Avelar-Cruz' petition alleges he is "in custody in violation of the Constitution [and] laws . . . of the United States." § 2241(c)(3). Accordingly, Avelar-Cruz has met the "in custody" jurisdictional requirement of 28 U.S.C. § 2241.

II. RETROACTIVE APPLICATION OF § 440(d)

A. PRESUMPTION AGAINST RETROACTIVITY AND DUE PROCESS

Prior to the passage of the AEDPA, Avelar-Cruz was eligible to apply for a waiver of deportation pursuant to § 212(c) of the INA. 8 U.S.C. 1182(c) (1994). Section 212(c) authorized the Attorney General to grant waivers of deportation to residents lawfully domiciled in the United States for at least seven years. In other words, the Attorney General could exercise her discretion to allow permanent residents, like Avelar-Cruz, to remain in the United States even after commission of a deportable offense. The enactment of § 440(d) of the AEDPA significantly reduced the Attorney General's discretion to grant applications for waiver of deportation. Specifically, the amendment rendered ineligible any alien who had committed: an aggravated felony; a controlled substance offense; certain firearm offenses; convictions of two crimes of moral turpitude; or other miscellaneous crimes. AEDPA § 440(d), 110 Stat. 1214, 1277 (amending INA § 212(c), 8 U.S.C. § 1182(c)).

Avelar-Cruz' convictions placed him in the aggravated felon and controlled substance offense categories of § 440(d). Relying on Avelar-Cruz' ineligibility for discretionary relief under AEDPA § 440(d), the immigration judge denied his application for a waiver of deportation pursuant to former INA § 212(c). The BIA affirmed on this basis. Avelar-Cruz argues that the application of § 440(d) to his case is impermissibly retroactive and violates the due process clause. Section 440(d) can be viewed as retroactive as applied to Avelar-Cruz in two respects. First, § 440(d) could be retroactive as applied to a pending application for relief. As discussed above, Avelar-Cruz had a waiver application pending on the date of the AEDPA's enactment. Second, § 440(d) could be retroactive as applied to criminal convictions that predate the enactment of the AEDPA.[3] Avelar-Cruz' criminal convictions predate the enactment of the AEDPA.

In *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994), the Supreme Court reaffirmed the time-honored presumption against statutory retroactivity. In determining whether a statute applies retroactively, the core inquiry is "whether the new provision attaches new legal consequences to events completed before its enactment." 511 U.S. at 269-70. *Landgraf* established a two-part test to guide a court's retroactivity analysis. First, the court must "determine whether Congress has expressly

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[3] The Seventh Circuit expressly left this issue open in *Reyes-Hernandez*, where the court stated it need not address the applicability of sections 440(a) and (d) where deportability was determined in a contested proceeding or where the criminal convictions or criminal acts occurred before the AEDPA was passed. 89 F.3d at 493.

prescribed the statute's proper reach." *Id.* at 1505. The "requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id.* at 268. Provided Congress has included an express command specifying the statute's temporal reach, there is no need to further advance the inquiry. If, however, Congress failed to specify the statute's temporal reach, the court must consider "whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.*

In the course of its survey of the jurisprudential history of the presumption against retroactivity, the Supreme Court identified a number of situations where application of new statutes to antecedent events is "unquestionably proper," even in the absence of a clear Congressional command. 511 U.S. at 273. The first illustration offered was statutes that authorize or affect the propriety of prospective relief, such as statutes altering the conditions for injunctive relief. Statutes creating or repealing jurisdiction were another notable example. The Court stated "[w]e have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274. Changes in procedural rules were another apt illustration. Because of the "diminished reliance interests in matters of procedure," these rules "may often be applied in suits arising before

their enactment without raising concerns about retroactivity." *Id.* at 275. In sum, a statute does not have retroactive effect "merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." *Id.* at 269-70.

As an initial matter, Congress did not specify the temporal reach of § 440(d). The AEDPA contains no effective date provision governing § 440(d). The section is therefore deemed effective on the date of enactment. Consequently, this court must address the second part of the *Landgraf* analysis: whether § 440(d) violates the presumption against retroactivity. Respondents argue that § 440(d) may be constitutionally applied to prior convictions because its amendment to § 212(c) is analogous to a jurisdictional statute or to one affecting the propriety of prospective relief. According to this interpretation, § 440(d) operates only prospectively, as a limitation on the Attorney General's authority to grant discretionary relief to a specified class of candidates for automatic deportation. Respondents find general support in *Landgraf* for this argument. Avelar-Cruz characterizes the effect of § 440(d) as retroactive. In Avelar-Cruz' view, the amendment to § 212(c) stripped him of a substantive cause of action – the right to apply for discretionary relief from deportation. Avelar-Cruz relies on the Supreme Court's recent decisions in *Hughes Aircraft Co. v. United States ex rel. Schumer*, ___ U.S. ___, 117 S. Ct. 1871 (1997) and *Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059 (1997).

Respondents' interpretation of § 440(d)'s effect finds overwhelming support in the plain language of the statute and in relevant precedent. The full text of INA § 212(c), as amended by § 440(d), reads:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under § 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 1251(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1251(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 1251(a)(2)(A)(i) of this title.

8 U.S.C. § 1182(c). The provision plainly defines the contours of the Attorney General's discretion to grant discretionary relief. In other words, § 440(d) makes aliens convicted of enumerated crimes ineligible for relief by limiting the Attorney General's discretion. Nothing in the express language of the provision lends itself to the argument that an application for a waiver is akin to a substantive cause of action. Indeed, unlike the statutory provisions at issue in *Hughes*, § 440(d) does not impair any rights Avelar-Cruz had when he committed the drug offenses for which he was convicted.[4] While at that time

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[4] Both *Hughes* and *Lindh* are ultimately inapposite because they involved statutory provisions that added new legal consequences to a substantive cause of action. *Hughes* involved

Avelar-Cruz could have applied for relief from automatic deportation, he could not have claimed a settled expectation in the ultimate granting of discretionary relief. In sum, § 440(d) simply scaled back the Attorney General's prospective discretion to grant a particular form of relief.

This conclusion is bolstered by relevant authority. In *Matter of Soriano*, Int. Dec. 3289 (A.G. Slip. Op. Feb. 21, 1997), the Attorney General addressed whether § 440(d) is retroactive as applied to pending cases. The Attorney General opined that § 440(d) applied to pending cases because it "does not impair a right, increase a liability, or impose new duties on criminal aliens." *Id.* at 4. In arriving at that conclusion, the Attorney General reasoned the relief sought in waiver applications is prospective in nature. She found support for this view in the Supreme Court's statement in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984), that: "The deportation hearing looks prospectively to the respondent's rights to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain." *Id.* at 5. Furthermore, she compared § 440(d) to a jurisdictional statute because it "speaks to the power of the

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an amendment that expanded the scope of *qui tam* actions under the False Claims Act. The Court stated: "In permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action. . . . " 117 S. Ct. at 1878. *Lindh* involved another section of the AEDPA, the section governing the standards applicable to habeas corpus petitions, 28 U.S.C. § 2254(d). The Supreme Court noted that "the statue [sic] goes beyond 'mere' procedure to affect substantive entitlement to relief." 117 S. Ct. at 2063.

Attorney General to waive deportation," just as jurisdictional statutes speak to the power of the court. *Id.* Thus, she concluded § 440(d) would not be retroactive as applied to pending cases.[5]

The federal appellate courts' analysis of the retroactivity of past Congressional amendments to § 212(c) is also instructive. Indeed, the AEDPA is not the first time Congress has rendered a class of felons ineligible for § 212(c) relief. The Immigration Act of 1990 rendered aggravated felons who served at least five years in prison ineligible to apply for a waiver. § 511(a), Pub. L. No. 101-649, 104 Stat. 4978, 5052 (1990). Aliens challenged the retroactivity of this provision as applied to convictions predating the enactment of the statute. The appellate courts uniformly rejected the contention that its application violated the presumption against retroactivity. *See, e.g., Scheidemann v. INS*, 83 F.3d 1517 (3d Cir. 1996); *Campos v. INS*, 16 F.3d 118 (6th Cir. 1994); *Barreiro v. INS*, 989 F.2d 62 (1st Cir. 1993); *Buitrago-Cuesta v. INS*, 7 F.3d 291 (2d Cir. 1993); *Osorio v. Fox*, 10 F.3d 1034 (4th Cir. 1993). In describing the nature of the interest effected by the statute, the courts rejected any claim of a reliance interest in the opportunity to apply for a waiver of deportation. *Kolster v. INS*, 101 F.3d 785, 789 (1st Cir. 1996)

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[5] In keeping with the Seventh Circuit's decision in *Reyes-Hernandez*, the Attorney General did carve out a narrow exception to the rule that § 440(d) applies in pending cases to allow aliens who conceded deportability prior to the enactment of the AEDPA, and who had a colorable defense to deportability, to reopen their cases. A.G. Slip. Op. at 8.

(citing cases). In particular, the Third Circuit in *Scheidemann* made the following decisive summary of the nature of discretionary relief under § 212(c):

> In this case, the consequences of petitioner's criminal conduct were clear at the time of that conduct and they remain unchanged today. He was subject to possible criminal sanctions and deportation. The only relevant change in the law relates to the permissible scope of the Attorney General's discretion to grant relief from one of those consequences. Like statutes altering the standards for injunctive relief, this change has only a prospective impact. It is not designed to remedy the past but only to affect petitioner's future status with respect to the legality of his presence in the United States. Like statutes constricting the jurisdiction of a judicial body, these changes speak only to the power of a public agency. Finally, like legislation altering procedural rights, the relevant amendments in this case regulate secondary rather than primary conduct and infringe on no significant reliance interest. Given the facts that petitioner's pre-1987 conduct clearly subjected him to deportation as well as criminal sanctions, and that § 212(c), as it then existed, offered relief from the former only at the unfettered discretion of the Attorney General, petitioner does not, and could not, contend that his conduct was undertaken in reliance on the then current version of § 212(c).

83 F.3d at 1523. Although the preclusive scope of § 440(d) is much broader than the scope of the 1990 amendment to § 212(c), the nature of discretionary relief remains the

same. In both instances, "the availability of purely discretionary relief does not create substantive rights in otherwise deportable aliens." *Kolster*, 101 F.3d at 789.

Another relevant line of authority was recently discussed by the Seventh Circuit in *Chow v. INS*, 113 F.3d 659 (1997). In *Chow*, the Seventh Circuit faced the issue whether § 440(a)'s preclusion of appellate review violated the presumption against retroactivity as to pending cases and as to pre-AEDPA criminal conduct. In reaching the conclusion that § 440(a)'s withdrawal of judicial review did not "attach new legal consequences to the alien's [prior criminal] conduct," the court reasoned:

> Courts routinely hold that the INS may lawfully deport an alien under a statute which makes certain conduct a ground for deportation even if the alien engaged in the conduct before the statute went into effect. *Marcello v. Bonds*, 349 U.S. 302, 314, 75 S. Ct. 757, 764, 99 L.Ed. 1107 (1955) (allowing deportation based on conviction that was not a ground for deportation at the time the alien was convicted); *Hamama v. INS*, 78 F.3d 233, 235-36 (6th Cir. 1996) (same); *Ignacio v. INS*, 955 F.2d 295, 298 (5th Cir. 1992) (same); *United States v. Bodre*, 948 F.2d 28, 32-33 (1st Cir. 1991) (same). Accordingly, making deportation a consequence of certain criminal acts does not attach new liabilities or penalties to those acts.

113 F.3d at 667. The present case presents an even stronger claim for a finding of no retroactive effect than did the cases cited in *Chow*. This is because § 440(d) does not go so far as to alter the primary grounds for deportation. Aliens in Avelar-Cruz' particular situation are subject to deportation for the same set of criminal offenses. In sum,

"§ 440(d) merely removes one potential means of avoiding deportation" for those offenses. *Guitierrez-Martinez*, 1998 WL at *5; *Vargas*, 96[illegible] Supp. at 1544.

Two courts have found § 440(d) impermissibly retroactive as applied to criminal conduct predating the enactment of the AEDPA. Both courts have evinced great concern that the provision upsets settled expectations which form the basis for guilty pleas entered by criminal aliens. *See, e.g., Sandoval*, 1997 U.S. Dist. Lexis at *35; *Mojica*, 970 F. Supp. at 176 – 78. While it is undeniable that immigration consequences may be a factor in a decision to plead guilty, this court is not convinced by *Sandoval* or *Mojica* that the availability of discretionary relief under § 212(c) is the sole or even a significant motivating factor in decisions to enter guilty pleas. It is a stretch to assume a criminal defendant would forgo a viable defense in order to enter a guilty plea to a crime that makes him subject to automatic deportation, simply for the opportunity to apply for discretionary relief. Nevertheless, one can imagine a scenario where § 440(d) would seem to frustrate the expectations of criminal aliens. *See Mojica*, 970 F. Supp. at 176. The presumption against retroactivity, however, affords no guarantee against upset expectations based in prior law. *Landgraf*, 511 U.S. at 1499. Rather, the question is whether § 440(d) attaches new legal consequences to Avelar-Cruz' criminal convictions. For the reasons stated above, this court answers that question in the negative.

Avelar-Cruz acknowledges Congress had a legitimate basis for making discretionary waiver unavailable for aliens who commit certain crimes. Avelar-Cruz argues

retroactive application of this policy to reach crimes committed before the AEDPA was enacted "violate[s] substantive due process norms." He conclusorily asserts Congress had no legitimate basis for denying aliens like him the opportunity to apply for a discretionary waiver. But Avelar-Cruz fails to demonstrate Congress acted irrationally when it sought to prevent *all* aliens convicted of aggravated felonies or controlled substance violations from obtaining waivers from orders of deportation.

B. EQUAL PROTECTION

Section 440(d) of the AEDPA states the discretionary waiver "shall not apply to an alien who is *deportable* by reason of having committed [enumerated offenses]." (emphasis added). The Board of Immigration Appeals interprets the underlined language to mean that legal permanent resident aliens ("LPR aliens") in *deportation* proceedings are disqualified from applying for a waiver, while LPR aliens in *exclusion* proceedings based on the same offense may apply for a waiver. *See Matter of Fuentes-Campos*, Int. Dec. No. 3318, 1997 WL 269368 (BIA May 14, 1997). Avelar-Cruz argues the distinction drawn by *Fuentes-Campos* is not rationally related to a legitimate governmental interest and therefore violates the equal protection clause. To address Avelar-Cruz' claim, it is necessary to set out some basic principles and briefly trace the development of the law in this area.

Deportable aliens reside in the United States, but are subject to deportation. 8 U.S.C. § 1251(a). Excludable aliens may be denied *entrance* into the United States. 8

U.S.C. § 1182(a). In § 212(c) of the INA, Congress provided that excludable aliens who were legal permanent residents of the United States for seven years and who traveled abroad voluntarily and temporarily could be readmitted at the discretion of the Attorney General. 8 U.S.C. § 1182(c). By its terms, the "waiver of exclusion" discretion given the Attorney General by § 212(c) applied only to excludable aliens seeking readmission to the United States. But in 1956, the BIA held that LPR aliens in deportation proceedings *who had previously traveled abroad* could apply for a waiver under § 212(c). The BIA reasoned that since those LPR aliens would have been eligible for discretionary relief at the time of readmission, discretionary relief could also be granted at a later juncture. *See Matter of G.A.*, 7 I. & N. Dec. 274 (BIA 1956). The BIA subsequently declined to extend § 212(c) discretionary relief to otherwise eligible LPR aliens who had *not* departed the country after being convicted. *See Matter of Arias-Uribe*, 13 I. & N. Dec. 696 (BIA 1971).

The discrepancy did not go unnoticed. In 1976, the Second Circuit held that in order to satisfy equal protection requirements, § 212(c) discretionary relief had to be available in *deportation* proceedings for LPR aliens who met the seven year requirement, *whether or not they traveled abroad after their convictions. Francis v. INS*, 532 F.2d 268 (2d Cir. 1976). The court found that extending § 212(c) relief to deportees who had left the country after committing a deportable offense, but not to deportees who had remained, was irrational and therefore violated the equal protection component of the Fifth Amendment Due Process Clause. "[A]n alien whose ties with this country are so strong that he has never departed . . . should receive

at least as much consideration as an individual who may leave." *Id.* at 273; *see also Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981).

The rule in *Francis* was universally accepted by federal appellate courts, including the Seventh Circuit. *See, e.g., Leal-Rodriguez v. INS*, 990 F.2d 939, 949 (7th Cir. 1993). The INS adopted *Francis* nationwide so that all eligible LPR aliens who were ordered deported could ask the Attorney General to waive the ground for deportability under § 212(c). *See Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976). Congress never explicitly amended the INA to make § 212(c) applicable to LPR aliens in deportation proceedings. Rather, § 212(c) was judicially extended in order to comply with equal protection principles.

Effective April 24, 1996, § 440(d) of the AEDPA amended § 212(c) and expressly eliminated discretionary relief for LPR aliens who were convicted of certain crimes, including the crimes committed by Avelar-Cruz. As previously indicated, the amendment itself used the word "deportable." As a result, the BIA interpreted § 440(d) to apply only to deportable aliens and not to *excludable* aliens. Accordingly, the BIA ruled § 212(c) discretionary relief remained available for LPR aliens in exclusion proceedings. *See Matter of Fuentes-Campos*, Int. Dec. No. 3318, 1997 WL 269368 (BIA May 14, 1997).

Section 212(c) as amended by AEDPA § 440(d) was repealed by IIRIRA § 304(b). IIRIRA § 304(a)(7) consolidated deportation and exclusion proceedings into a single category of "removal" proceedings, eliminating the distinction Avelar-Cruz challenges in this case. However,

IIRIRA does not apply to deportation proceedings pending as of April 1, 1997. *See* IIRIRA § 309(c)(1). Avelar-Cruz' deportation proceedings were pending as of April 1, 1997. Accordingly, IIRIRA cannot cure any harm suffered by Avelar-Cruz.

Avelar-Cruz argues the distinction drawn by *Fuentes-Campos* is not rationally related to a legitimate governmental interest and therefore violates the equal protection clause. Avelar-Cruz concedes that the equal protection analysis must proceed under the minimal "rational basis" test, but argues that under *Francis* no rational basis exists for treating LPR aliens who temporarily leave the country differently from otherwise similarly situated aliens who do not leave the country. Avelar-Cruz points out two courts have already found that denial of an LPR alien's application for waiver based on § 440(d) violates the equal protection clause where the application was denied in deportation proceedings (1) pending as of April 1, 1997 (*i.e.*, not governed by IIRIRA's repeal of § 440(d)) and (2) decided by the BIA after the May 14, 1997 *Fuentes-Campos* decision. *See Jurado-Gutierrez v. Greene*, 977 F. Supp. 1089 (D. Colo. 1997); *Vargas v. Reno*, 966 F. Supp. 1537 (S.D. Cal. 1997).

Respondents argue *Francis* is distinguishable because it found an equal protection violation based on the disparate treatment of two groups of *deportable* LPR aliens – those who had traveled abroad and returned after their convictions, and those who had never left the country. Respondents emphasize that both groups were in *deportation* proceedings. Adopting the reasoning of *Fuentes-Campos*, respondents suggest the rationale of *Francis* does

not speak to the relative treatment of LPR aliens in deportation proceedings as compared to those in *exclusion* proceedings. In short, respondents contend Avelar-Cruz' equal protection challenge must fail because LPR aliens in deportation proceedings are not similarly situated to LPR aliens in exclusion proceedings.

Respondents argue it is well-established that excludable aliens and deportable aliens are not similarly situated, citing *Landon v. Plasencia*, 459 U.S. 21, 31 (1982). In that case, Plasencia was a legal permanent resident alien who was placed in an exclusion proceeding upon trying to re-enter the United States. Plasencia argued she was entitled to have the question of her admissibility litigated in a deportation proceeding, where she would be entitled to procedural protections and substantive rights not available in exclusion proceedings. The Ninth Circuit agreed, relying in part on *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953). The Supreme Court reversed, stating:

> The reasoning of *Chew* was only that a resident alien returning from a brief trip has a right to due process just as would a continuously present resident alien. It does not create a right to identical treatment for these two differently situated groups of aliens.

Landon, 459 U.S. at 31.

Based on this statement, respondents conclude excludable LPR aliens and deportable LPR aliens are not similarly situated for purposes of the present equal protection challenge. But it will not do to transplant the "differently situated" language from *Landon* (a due process challenge) and apply it casually to all equal protection challenges involving deportation and exclusion

proceedings, irrespective of the statute challenged. For purposes of the equal protection clause, the question whether two groups on either side of a governmental classification are similarly situated is not decided in the abstract. Rather, courts must determine whether the two groups are similarly situated *with respect to the purpose of the law challenged*. "A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the [law]." Gerald Gunther & Kathleen M. Sullivan, *Constitutional Law* 636 – 37 (13th ed. 1997) (quoting Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif.L.Rev. 341 (1949)). Accordingly, the threshold question is whether LPR aliens in deportation proceedings and LPR aliens in exclusion proceedings are similarly situated with respect to the purpose of AEDPA § 440(d).

There can be no doubt that with respect to the purpose of § 440(d), LPR aliens in deportation proceedings are similarly situated to LPR aliens in exclusion proceedings. Skimming the legislative history of the AEDPA, there appears to be no reason why Congress would have sought to restrict discretionary relief as to LPR aliens who committed enumerated offenses, but not curtail discretionary relief if those same LPR aliens thereafter leave the country and seek to re-enter. Indeed, *Vargas* and *Jurado-Gutierrez* rejected the differences between deportation and exclusion proceedings as irrelevant for purposes of the present equal protection analysis. *Vargas* states that drawing a distinction based on the name of the proceeding:

> . . . does not respond to the arbitrariness of allowing LPR aliens who have left the U.S. for a

> short time to file for a waiver, while not allowing LPR aliens who have remained in the U.S. the same option. The fact that the proceedings have different names does not affect the fact that two similarly situated LPR aliens are receiving disparate treatment.

Vargas, 966 F. Supp. at 1546-47. *Jurado-Gutierrez* added the following:

> In view of *Francis* and *Vargas*, there appears to be no rational basis for applying the distinction made by the BIA. If petitioner had left the country for a visit to Mexico . . . he would have been entitled to a § 212(c) discretionary hearing. Simply because he did not leave the country, he was placed in deportation proceedings and denied a § 212(c) hearing.

Jurado-Gutierrez, 977 F. Supp. at 1093.

This court shares the view of *Vargas* and *Jurado-Gutierrez*. There is no rational basis for affording LPR aliens who leave the country after their conviction an opportunity to apply for discretionary relief, but denying that same opportunity to other LPR aliens (who are deportable for the same offenses) merely because they failed to travel abroad and remained in the country. Respondents suggest Congress was most concerned with expeditiously removing criminal aliens who are *inside* the United States. This justification is wholly incredible. If the Attorney General grants waivers to LPR aliens in exclusion proceedings, they are allowed *inside* the United States; Congress' purported concern with expeditiously removing criminal aliens who are *inside* the United States

would necessarily be flaunted. Respondents suggest Congress took a legitimate "first step" at reforming the system of discretionary waivers for certain criminal offenses. It is undeniable that Congress may address a problem "one step at a time." However, each step that classifies groups of people and affords them different protection under the law must have a rational basis. Like the courts in *Vargas* and *Jurado-Gutierrez*, this court has searched to find a rational basis to support the distinction at issue. The search has been to no avail.

As interpreted and applied by the BIA in *Fuentes-Campos*, AEDPA § 440(d) violates Avelar-Cruz' equal protection rights. In light of Congress' probable intent, the preferred remedy would be to remove the benefit of a discretionary waiver hearing from both categories of aliens. But the benefit in this instance has already been irrevocably conferred. After the *Fuentes-Campos* decision on May 14, 1997, at least one similarly situated alien in an exclusion proceeding was given a discretionary waiver hearing, while Avelar-Cruz was not. To remedy this equal protection violation, Avelar-Cruz should be granted a hearing pursuant to the old (*i.e.*, pre-AEDPA) § 212(c). The court expresses no opinion on the merits of Avelar-Cruz' application for discretionary relief.

CONCLUSION

Jose Martin Avelar-Cruz' petition for writ of habeas corpus is granted. Accordingly, petitioner is eligible for a waiver under Section 212(c) of the Immigration and

Nationality Act. Petitioner's deportation is stayed pending consideration of his waiver application by an immigration judge.

ENTER:

/s/ Suzanne B. Conlon
Suzanne B. Conlon
United States District Judge

April 27, 1998

APPENDIX C

United States District Court
Northern District of Illinois
Eastern Division

AVELAR-CRUZ

v.

RENO, et al.

JUDGMENT IN A CIVIL CASE

Case Number: 98 C 1193

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

It is ordered and adjudged that the petition for writ of habeas corpus is granted.

Michael W. Dobbins, Clerk of Court

/s/ Jacquelyn H. Collier
Jacquelyn H. Collier,
Deputy Clerk

Date: 4/27/1998

APPENDIX D

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A91 342 955 – Chicago Date: JAN – 8 1998

In re: JOSE MARTIN AVELAR-CRUZ

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: M. Alma Alvardo, Esquire
Legal Services Center for Immigrants
Legal Assistance Foundation of Chicago
111 West Jackson Boulevard,
3rd Floor
Chicago, Illinois 60604-3502

ORDER:

PER CURIAM. You are seeking relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). However, you are statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." *See* Antiterrorism and Effective Death

Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") § 440(d); *Matter of Soriano*, Interim Decision 3289 (A.G., Feb. 21, 1997).

You have argued on appeal that AEDPA violates the equal protection clause of the Constitution because the new 212(c) provisions apply only in deportation proceedings and not in exclusion proceedings. We cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos*, Interim Decision 3318 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992).

Accordingly, your appeal is dismissed.

/s/ Fred W. Vacca
FOR THE BOARD

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHICAGO, ILLINOIS

File No.: A 91 342 955 November 18, 1996

In the Matter of	)	IN DEPORTATION
JOSE M. AVELAR CRUZ	)	PROCEEDINGS
	)	
Respondent	)	
	)	

CHARGES: Section 241(a)(2)(A)(iii), at any time after entry you've been convicted of a crime constituting an aggravated felony; and also under Section 241(a)(2)(B)(i) in that you've been convicted of violating a law of any state in the United States or any foreign country concerning controlled substances.

APPLICATION: Waiver under Section 212(c).

ON BEHALF OF RESPONDENT:

Susan Compernolle, Esquire

ON BEHALF OF SERVICE:

Seth Fitter, Esquire
Assistant District Counsel
INS
Chicago, IL

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent is a 24-year-old married male, who is a native and citizen of Mexico. He was admitted as a permanent resident on May 10, 1989. Prior to that date, however, he became a lawful temporary resident as of September 25, 1987. After a hearing held on June 20, 1994, at Stateville Prison, he admitted the allegations 1 through 5 on his Order to Show Cause, but denied allegations 6 and 7 and denied the charges of deportability. The Court found the Respondent deportable on both charges based on the conviction records presented by the Service at his deportation hearing. Specifically, Exhibits Number 2 and 3. Those convictions records showed that on September 7, 1993, he was convicted of possession of a controlled substance with intent to deliver and delivery of controlled substance. Based on the records of conviction, the Court found him deportable under Sections 241(a)(2)(B)(i) and 241(a)(2)(A)(iii) of the Act.

After Respondent appealed that decision, the Board of Immigration Appeals (hereinafter the Board), in a decision dated November 14, 1994, upheld this finding and agreed that the Respondent, in addition, was statutorily barred from a 212(c) waiver because he had not accrued seven years of domicile in the United States after a lawful admission as a permanent resident. However, on June 27, 1995, the Seventh Circuit in a decision entitled *Avelar Cruz v. INS*, reversed and remanded on the ground that the period that the Respondent had accrued in the United States after admission as a lawful temporary resident counted toward the accumulation of years of unrelinquished domicile.

Finally, on February 7, 1996, the Board remanded the case in order to afford the Respondent "a further opportunity to pursue his application for relief under Section 212(c) of the Act."

The issue presented by the case today is whether the Respondent remains eligible for a 212(c) waiver notwithstanding the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA).

AEDPA barred a 212(c) applicant who is deportable by reason of having committed any criminal offense covered in Sections 241(a)(2)(A)(iii) and (B) of the Act. The Immigration Service contends that the Respondent is barred from the waiver because of its proscription of 212(c) relief for any alien found deportable as an aggravated felon. It further contends that the provision under section 440(d) of AEDPA became effective as of April 24, 1996. The Respondent raises a number of contentions in response.

Respondent's contentions are as follows: First, the Respondent contends that his eligibility for a 212(c) waiver should be restored nunc pro tunc pursuant to the Seventh Circuit's decision in *Batanic* and *Snadier v. INS*. I disagree that those cases control the outcome in this case. I think that *Batanic* is distinguishable on the facts in this case. In *Batanic*, the Seventh Circuit Court of Appeals held that an alien had been denied the right to counsel and also the right to confer with counsel about an application for political asylum. In *Snadier v. INS*, the Seventh Circuit held that an alien should have been notified of his right to counsel after the Service lodged an additional charge of deportability. This case is distinguishable from

both of those cases which implicated procedural due process rights. Both cases involved actions taken or not taken in the course of a deportation hearing. In contrast, the Respondent's procedural due process rights were not impaired by any action which the Immigration Judge took in his prior deportation hearing in 1994. The Immigration Court in that case applied the Board's precedent, in particular, *Matter of Newton*, which required that an alien established seven years of unrelinquished domicile after a lawful admission as a permanent resident. The Board agreed with that decision, but the Seventh Circuit reversed in *Avelar Cruz* and also in *Castillo Contreras v. INS*. In short, the Seventh Circuit applied a different standard than that which was considered by both by either the Immigration Court or by the Board of Immigration Appeals when they considered the case. The Seventh Circuit did not find that the Board erred, but rather established a different precedent for considering such, such [sic] requests.

In addition, the Respondent contends that he filed an application for a 212(c) waiver prior to the effective date of AEDPA and that the Board's reasoning in *Matter of Soriano* should be followed. However, the Attorney General vacated the *Soriano* decision on September 12, 1996 setting aside the Board's finding that an applicant for a 212(c) waiver who had filed the application prior to April 24, 1996 was not barred by AEDPA. The Board held in the *Soriano* decision that even though the general principle of statutory construction is that a law takes effect on the date of its enactment, the Board nonetheless construed another provision, Section 413, of AEDPA to reflect a legislative intent to consider applications filed prior to

April 24, 1996, to construe them under prior law. As I have noted, however, the vacation of the *Soriano* decision effectively eliminated the case and any exception which it had established as precedent in interpreting the AEDPA provisions relating to 212(c) relief.

The Respondent also contends that *Matter of AA* established and interpreted a statutory bar contained in Section 511(b) and held that that bar shall apply to admissions occurring after the date of the enactment of the Act and that it refers to applications submitted after November 29, 1990, rather at a port of entry before a District Director, or before an Immigration Judge in subsequent proceedings. The Respondent argues that the point in time that the application is filed establishes the law under which the application should be considered as a result of this decision in *Matter of AA*. I don't agree that *Matter of AA* supports the Respondent's position. I reach this conclusion because the Board in *Matter of AA* construed a specific statutory bar to 212(c) relief in the applications to which it should be applied. I disagree with the contention of the Respondent that the alien here is seeking to reenter the United States by making an application for a 212(c) waiver. The alien is simply seeking to be restored to the status which he held prior to the institution of deportation proceedings, namely, the status of permanent resident. See *Matter of Balderes,* Int. Dec. 3159 (BIA 1991), citing the proposition that the waiver does not cause criminal convictions to disappear from the alien's record even after a waiver is granted. That those criminal convictions may be considered in subsequent determinations for deportability or for 212(c) relief.

In addition, the Respondent raises the defense of mouse-trapping set forth by the Seventh Circuit in the decision of *Reyes Hernandez v. INS*. In that case, the alien did not contest deportability believing that he was eligible for a 212(c) waiver and he conceded deportability and was allowed to proceed on his application because the Seventh Circuit concluded that to rule otherwise would have allowed him to be mousetrapped into conceding deportability on the expectation that he could apply for a waiver under section 212(c). However, I think that case is distinguishable and is not precedent for this case. In this case, in contrast, the alien never conceded either charge of deportability and effectively denied both the charges and the allegations relating to his criminal convictions. Those allegations and the charges were established by the submission of conviction records. Finding of deportability on both charges has never been contested in any subsequent proceeding. In short, there was no quid pro quo of a concession of the allegations and charges in this case. Furthermore, there is no colorable defense to the charges of deportability either, since the convictions established the Respondent's deportability under both charges.

Finally, the Respondent requests that he be allowed to continue the case so that his spouse can file a visa petition and enable him to qualify for adjustment of status. The Respondent indicates in his brief and has submitted a marriage certificate indicating that he's now married to Lisa Hernandez as of June 22, 1996, and that she is a United States citizen who would petition for him to become a permanent resident. He also states that she is

the mother of his daughter Jasmin. However, I am unwilling to continue the case for the following reasons. First, even if a visa petition were approved, the Respondent would not be eligible for adjustment of status because he has been convicted of a crime constituting an aggravated felony. This situation is quite different from the aliens in *Matter of Gabrielski* and its progeny where the alien would be eligible for adjustment of status if it were granted in conjunction with a 212(c) waiver, but would have been ineligible for adjustment if either relief had been considered separately or alone. Here, the Respondent is ineligible for a 212(c) waiver. In addition, he is barred from adjustment of status. In addition, there is no waiver available to him. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Section 212(h) was amended to bar the waiver from being granted to an alien who had been convicted of a crime constituting an aggravated felony. Consequently, nothwithstanding the Respondent's present relationship with a United States citizen, he would not qualify for adjustment of status even if a visa petition were approved because of the crimes which would bar his admissibility.

In summary, I have concluded the Respondent is barred on a 212(c) waiver pursuant to section 440(d) of AEDPA, which was effective as of April 24, 1996 and makes him ineligible for a 212(c) waiver. There is no other relief available to the Respondent.

The Respondent has designated Mexico as the country of deportation. The Court concurs with that designation. Accordingly, the following orders are entered.

ORDER

IT IS ORDERED that the Respondent's application for a 212(c) waiver be denied.

IT IS FURTHER ORDERED that the Respondent be deported to Mexico pursuant to the charges listed in his Order to Show Cause.

/s/ _____
CRAIG M. ZERBE
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE CRAIG M. ZERBE in the matter of:

JOSE M. AVELAR CRUZ

A 91 342 955

CHICAGO, ILLINOIS

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Susan Ardoin
Susan Ardoin, Transcriber

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881 3344

March 10, 1997
(Completion Date)

APPENDIX F

U.S. DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

Office of the Immigration Judge

In the Matter of: Case No.: A 91-342-955

/s/ Jose Avelar-Cruz Docket: Chicago

RESPONDENT IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 11-18-96.

This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

[✓] The respondent was ordered deported to Mexico as an aggravated felon.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered deported to _____ or in the alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____, with an alternate order of deportation to _____ or _____.

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for withholding of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for suspension of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for suspension of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for waiver under Section _____ of the Immigration and Nationality Act was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[✓] Respondent's application for 212(c) was ( ) granted (✓) denied ( ) withdrawn ( ) other.

[ ] Proceedings were terminated.

[ ] The application for adjustment of status under Section (216) (216A) (245) (249) was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under Section 246.

[ ] Other _____

[✓] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

Pursuant to Sec. 242B
Oral and Written Advisals
were given and served Ref.
"Limitation on Discretionary Relief"

/s/ Illegible
Immigration Judge

Date: 11-18-96

Appeal: RESERVED/WAIVED (A/I/B)

_____

APPENDIX G

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A91 342 955 – Chicago Date: FEB – 7 1996

In re: JOSE MARTIN AVELAR-CRUZ

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: Susan Compernolle, Esquire
Legal Assistance Foundation of Chicago
1661 S. Blue Island Avenue
Chicago, Illinois 60608

ON BEHALF OF SERVICE: Joseph M. Yeung
General Attorney

CHARGE:

Order: Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C. § 1251(a)(2)(B)(i)] – Convicted of controlled substance violation

Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)] – Convicted of aggravated felony

ORDER:

PER CURIAM. Pursuant to the June 27, 1995, decision of the United States Court of Appeals for the Seventh Circuit pertaining to the respondent, the November 14, 1994, decision of the Board is vacated and the record

is remanded to the Immigration Judge. Upon remand, the respondent is to have a further opportunity to pursue his application for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), consistent with the order of the Court of Appeals and the controlling precedent of *Castellon-Contreras v. INS*, 45 F.3d 149 (7th Cir. 1995).

/s/ Illegible
FOR THE BOARD

APPENDIX H

JOSE M. AVELAR-CRUZ, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 94-3721.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

June 2, 1995, Argued

June 27, 1995, Decided

Robert E. Lehrer, LEGAL ASSISTANCE FOUNDATION OF CHICAGO, Chicago, IL. Susan Compernolle (argued), Lisa J. Palumbo, Chicago, IL, for petitioner.

Janet Reno, U.S. Atty. Gen., OFFICE OF U.S. ATTY. GEN., Washington, DC, A. D. Moyer, Samuel Der-Yeghiayan, I.N.S., James B. Burns, OFFICE OF U.S. ATTY., Chicago, IL, William J. Howard, Robert Kendall, Jr., David M. McConnell, Norah Ascoli Schwarz (argued), U.S. DEPT. OF JUSTICE, Civ. Div., Immigration Litigation, Washington, DC, for respondent.

Before CUMMINGS, KANNE, and ILANA DIAMOND ROVNER, Circuit Judges.

ILANA DIAMOND ROVNER, Circuit Judge. Jose M. Avelar-Cruz petitions for review of a final order of the Board of Immigration Appeals (the "Board" or "BIA") finding him statutorily ineligible to seek a discretionary waiver of deportation under section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c). The Board determined that Avelar-Cruz had not accumulated the

seven consecutive years of lawful unrelinquished domicile required for relief under that statute. In petitioning for review of that decision, Avelar-Cruz relies on our decision in *Castellon-Contreras v. INS*, 45 F.3d 149 (7th Cir. 1995), which rejected the Board's position that an alien must be a lawful permanent resident to be lawfully domiciled in this country under section 212(c). We held instead that an alien may establish a lawful domicile and thus begin to accumulate time toward the seven-year requirement when he becomes a "lawful temporary resident" under section 245A(a) of the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1255a(a). Avelar-Cruz became a lawful temporary resident more than seven years prior to the Board's decision here, and he therefore argues that under *Castellon-Contreras*, he is statutorily eligible for section 212(c) relief. Because we agree that *Castellon-Contreras* is controlling and that it entitles Avelar-Cruz to relief from the Board's order, we grant his petition for review.

I.

Avelar-Cruz was born in Mexico and entered the United States illegally in 1975. He became a lawful permanent resident on May 10, 1989, pursuant to IRCA's general amnesty provision, 8 U.S.C. § 1255a(b). Prior to that, however, Avelar-Cruz had become a lawful temporary resident on September 25, 1987, when he submitted an application pursuant to 8 U.S.C. § 1255a(a) and paid the application fee. *See Castellon-Contreras*, 45 F.3d at 154; 8 C.F.R. § 245a.2(s) ("The status of an alien whose application for temporary resident status is approved shall be adjusted to that of a lawful temporary resident as of the

date indicated on the application fee receipt issued at Service Legalization Office."). The present deportation proceedings were commenced after Avelar-Cruz pled guilty to two drug charges in the Circuit Court of Cook County, Illinois. The Immigration Judge ("IJ") found Avelar-Cruz deportable (*see* 8 U.S.C. §§ 1251(a)(2)(A)(iii) & 1251(a)(2)(B)(i)), and Avelar-Cruz then applied for a discretionary waiver of deportation under section 212(c).[1] The IJ denied that request, finding that Avelar-Cruz had not yet accumulated the seven years of lawful unrelinquished domicile required for section 212(c) relief. The IJ therefore ordered that Avelar-Cruz be deported to Mexico.

In appealing the IJ's ruling to the Board, Avelar-Cruz argued that he was eligible for section 212(c) relief under two alternative theories – because he became a lawful domiciliary on the effective date of IRCA, November 6, 1986, or when he became a lawful temporary resident on September 25, 1987. The Board addressed and rejected both positions, finding that Avelar-Cruz had become a

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[1] That section provides in pertinent part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General . . . .

8 U.S.C. § 1182(c). Although the section on its face is addressed only to returning residents, we have applied it as well "to lawful permanent residents who have not left the United States but [who] meet the seven-year requirement and face deportation." *Cortes-Castillo v. INS*, 997 F.2d 1199, 1202 (7th Cir. 1993); *see also Henry v. INS*, 8 F.3d 426, 430 n.4 (7th Cir. 1993).

lawful domiciliary only when he obtained the status of lawful permanent resident on May 10, 1989. Thus, on November 14, 1994, the Board affirmed the IJ's deportation order.

In petitioning for review of the Board's order, Avelar-Cruz contends that our recent decision in *Castellon-Contreras* makes clear that he is eligible for a discretionary waiver of deportation under section 212(c). In that case, we considered the meaning of the phrase "lawful unrelinquished domicile" and rejected the Board's position that only a "lawful permanent resident" could be lawfully domiciled in this country for purposes of section 212(c). 45 F.3d at 152, 153. That position, we explained, was inconsistent with the plain meaning of the phrase "lawful unrelinquished domicile," as "domicile" traditionally has been understood only "to mean physical presence and the intent to remain somewhere indefinitely." *Id.* at 153. For a domicile to be lawful, then, the alien need not necessarily obtain lawful permanent residency but must at least "have the ability, under the immigration laws, to form the intent to remain in the United States indefinitely." *Id.*; *see also Lok v. INS*, 681 F.2d 107, 109 (2d Cir. 1982). We concluded that by applying for amnesty under IRCA and becoming a lawful temporary resident, an alien could form the requisite intent to remain in this country indefinitely, because at that point, he could have his status adjusted to that of lawful permanent resident simply by residing continuously in the United States and submitting the required application. *Castellon-Contreras*, 45 F.3d at

154.[2] We therefore held that an alien could establish a lawful domicile in this country under section 212(c) by becoming a lawful temporary resident under IRCA. *Id.* The Ninth Circuit recently reached the same conclusion in *Ortega de Robles v. INS, No. 93-70461, 1995 U.S. App. LEXIS 13510,* * 13-16 (9th Cir. June 2, 1995).

Because Avelar-Cruz became a lawful temporary resident under IRCA on September 25, 1987, he accumulated seven consecutive years of lawful unrelinquished domicile before the Board affirmed the IJ's order of deportation on November 14, 1994.[3] Under *Castellon-Contreras,* then, Avelar-Cruz is eligible for a discretionary waiver of deportation under section 212(c).

II.

The INS, however, advances two arguments to avoid the result compelled by *Castellon-Contreras.* First, it insists

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[2] At the same time, we rejected the petitioner's argument that he had become a lawful domiciliary on the effective date of IRCA because in applying for temporary resident status, he conceded that he was in this country illegally even after the statute's effective date. *Id.* (citing 8 U.S.C. § 1255(a)(2)(A)).

[3] Our cases hold that lawful permanent resident status is lost only once the Board affirms the order of deportation entered by the Immigration Judge, resulting in a final order of deportation. *See, e.g., Castellon-Contreras,* 45 F.3d at 155 n.8; *Variamparambil v. INS,* 831 F.2d 1362, 1366-67 (7th Cir. 1987); *see also Henry,* 8 F.3d at 434-35 ("Our decision in *Variamparambil* means only that lawful permanent resident status terminates upon entry of a final order of deportation for purposes of fulfilling the seven years of lawful unrelinquished domicile required for section 212(c) relief.").

that Avelar-Cruz failed to exhaust his administrative remedies because he never argued to the Immigration Judge that the seven-year period of lawful unrelinquished domicile commenced when he became a lawful temporary resident. Alternatively, the INS contends that even if Avelar-Cruz properly preserved that argument, *Castellon-Contreras* is not controlling because its discussion of lawful temporary residence is dicta. Neither argument is persuasive.

Although Avelar-Cruz readily concedes that he never based his section 212(c) argument before the IJ on his status as a lawful temporary resident, he advances an eminently reasonable explanation for that omission – the deportation hearing was not seven years removed from the date that he became a lawful temporary resident. Thus, such a theory would not have helped Avelar-Cruz before the IJ. As a result, Avelar-Cruz argued only that he had become a lawful domiciliary on the effective date of IRCA. While his case was on appeal to the Board, however, Avelar-Cruz celebrated the seventh anniversary of his status as a lawful temporary resident. In his brief to the Board, therefore, Avelar-Cruz pointed both to IRCA's effective date and to the date he became a lawful temporary resident as establishing his lawful domicile in this country. The Board fully recognized that Avelar-Cruz was also relying on his status as a lawful temporary resident under IRCA to support his request for section 212(c) relief, and the Board did not suggest that it considered the argument either unexhausted or waived. To the contrary, the Board considered the argument on its merits and rejected it. It of course is the decision of the Board, not that of the IJ, that we have jurisdiction to review. *See*

Balazoski v. INS, 932 F.2d 638, 640 (7th Cir. 1991); *see also Cordoba-Chaves v. INS*, 946 F.2d 1244, 1246 (7th Cir. 1991). Because the Board did not consider the argument waived and addressed its merits, we have jurisdiction to review the Board's resolution of that issue. *See, e.g., Cipriano v. INS*, 24 F.3d 763, 764 (5th Cir. 1994); *Douglas v. INS*, 28 F.3d 241, 245 (2d Cir. 1994); *Waldron v. INS*, 17 F.3d 511, 515 n.7 (2d Cir.), *cert. denied*, 130 L. Ed. 2d 489, 115 S. Ct. 572 (1994); *cf. Henry v. INS*, 8 F.3d 426, 439 n.19 (7th Cir. 1993) (refusing to consider argument raised for the first time in a petition for review when petitioner had the opportunity but failed to raise the argument before the Board).

Having concluded that the temporary residence argument is properly before us, we must consider the Service's alternative position that *Castellon-Contreras* is not controlling because its discussion of that issue is dicta. That position is based on our ultimate conclusion in *Castellon-Contreras* that the petitioner was ineligible for section 212(c) relief because he had not accumulated seven years of lawful unrelinquished domicile after becoming a temporary resident. *See* 45 F.3d at 154-55. Because Castellon-Contreras was not eligible for relief even under the panel's interpretation of the statute, the Service maintains that the decision's discussion of temporary residence is non-binding dicta. We disagree.

The proper interpretation of the phrase "lawful unrelinquished domicile" in section 212(c) was squarely presented by the parties and addressed by the panel in *Castellon-Contreras*, 45 F.3d at 152. The Board had held that "lawful unrelinquished domicile" should be equated with "lawful permanent residence," whereas Castellon-

Contreras maintained that he had established a lawful domicile on IRCA's effective date even if he was not yet a permanent resident of this country. We rejected both positions, holding instead that an alien could establish a lawful domicile by becoming a lawful temporary resident under 8 U.S.C. § 1255a(a). *Id.* at 154. Although that conclusion did not help Castellon-Contreras, our considered interpretation of the statutory language was not thereby relegated to the status of obiter dictum. We could only determine whether Castellon-Contreras was eligible for section 212(c) relief by first deciding when he had established a lawful domicile in this country. That issue therefore received extended treatment in the panel's opinion. *Cf. United States v. Crawley*, 837 F.2d 291, 292-93 (7th Cir. 1988). The panel explicitly ruled that Castellon-Contreras became a lawful domiciliary when he acquired the status of lawful temporary resident under IRCA. *Castellon-Contreras*, 45 F.3d at 154. Although that holding ultimately did not make Castellon-Contreras eligible for relief under section 212(c), it was not dicta. *See Cole Energy Dev. Co. v. Ingersoll-Rand Co.*, 8 F.3d 607, 609 (7th Cir. 1993) ("explicit rulings on issues that were before the higher court . . . are not dicta.").

III.

Castellon-Contreras applies to Avelar-Cruz' case and is controlling. Under that decision, Avelar-Cruz became a lawful domiciliary on September 25, 1987, when he became a lawful temporary resident under IRCA's amnesty provisions. He thus accumulated seven consecutive years of lawful unrelinquished domicile prior to the entry of a final order of deportation by the Board. As a

result, he is eligible to be considered for a discretionary waiver of deportation under section 212(c). We therefore GRANT the petition for review and REMAND to the Board for further proceedings consistent with this opinion.

IT IS SO ORDERED.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

GARY LAGUERRE, Plaintiff,	)	No. 97 C 8225
v.	)	
JANET RENO, et al., Defendants.	)	

MEMORANDUM OPINION AND ORDER

Gary Laguerre ("Laguerre") petitions for writ of habeas corpus pursuant to 28 U.S.C. § 2241, Art. I, § 9, cl. 2 of the Constitution, and 28 U.S.C. § 1331.[1] Laguerre seeks review of a final order of deportation. He contends he is being held in custody in violation of his statutory rights under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 et seq., and in violation of due process because of an immigration judge's retroactive application of § 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") during his deportation hearing. Pub. L. No. 104-132, 110 Stat. 1214 (1996). In the alternative, he moves to reopen his deportation proceeding so that he may present a colorable defense to deportation. Laguerre names Janet Reno, Attorney General of the United States, Doris Meissner, Commissioner of the Immigration and Naturalization Service ("the

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[1] Laguerre's initial petition was filed on November 24, 1997. An amended petition, containing new and revised factual allegations, was filed on December 24, 1997.

INS"), and Brian Perryman, Chicago District Director of the INS, as respondents. Respondents move to dismiss the amended petition for lack of subject matter jurisdiction and for failure to allege a constitutional violation upon which relief may be granted. In the alternative, respondents move for summary judgment. Laguerre responds to the motion to dismiss and files a cross-motion for summary judgment.

BACKGROUND

The following background facts are drawn from the certified administrative record of the INS proceedings and the parties' statements of undisputed facts.[2] Laguerre is a twenty-four year old citizen of Haiti who lawfully entered the United States as a permanent resident alien on August 13, 1985. R.1; Resp. 12(M) ¶ 1; Am. Pet. ¶¶ 3,5. On February 23, 1995, Laguerre pled guilty to one count of delivery of a controlled substance containing cocaine, in violation of 720 ILCS 570/401(C)(2); and one count of delivery of a controlled substance containing cocaine within 1000 feet of a school, in violation of 720 ILCS 570/401(C)(2) and 720 ILCS 570/407(B)(1). R. 2-8; Resp. 12(M) ¶ 2; Am. Pet. ¶ 8. Laguerre was given concurrent sentences of four years for these offenses. R. 2-8; Am. Pet. ¶ 10. The circuit court judge turned Laguerre over to the custody of the Illinois Department of Corrections ("IDOC"). Am. Pet. ¶ 9. He recommended petitioner for

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[2] References to the certified administrative record are cited as "R." References to Laguerre's amended petition for a writ of habeas corpus are cited as "Am. Pet. ¶" and references to respondents' statement of undisputed facts as "Resp. 12(M)."

impact incarceration under 730 ILCS 5/5-8-1.1, a form of boot camp for youthful offenders between the ages of 17 and 29. *Id.* The IDOC determined that Laguerre was ineligible for the boot camp because of his immigration status. *Id.* ¶ 11. Consequently, he was incarcerated at Sheridan Correctional Center ("Sheridan"). Am. Pet. ¶¶ 12; Resp. 12(M) ¶ 3.

Laguerre served thirteen months at Sheridan. Am. Pet. ¶ 12; Resp. ¶ 3. In the interim, on December 19, 1995, INS issued an order to show cause against Laguerre alleging that he was deportable under the INA, as an aggravated felon under 8 U.S.C. § 1251(a)(2)(A)(iii) and for violations of a law in relation to controlled substances as provided in 8 U.S.C. § 1251(a)(2)(B)(i). R. 9-15; Resp. 12(M) ¶ 4.[3] Upon release from incarceration at Sheridan

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[3] Sections 1251(a)(2)(A)(iii) and (a)(2)(B)(i) provide:

(A) General Crimes

. . . .

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after entry is deportable.

. . . .

(B) Controlled Substances

(i) Conviction

Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

in March 1996, Laguerre was taken into INS custody and transferred to a detention center in El Paso, Texas. Am. Pet. ¶ 14; Resp. 12(M) ¶ 3. On April 11, 1996, he filed a motion for change of venue to Chicago, Illinois. R. 16-17; Am. Pet. ¶ 17; Resp. 12(M) ¶ 5. On April 18, 1996, pursuant to a telephonic bond hearing in El Paso, the immigration judge ordered Laguerre released from INS custody under a $5,000 bond; but the bond was not posted at that time. R. 18; Am. Pet. ¶ 16; Resp. 12(M) ¶ 6. Laguerre subsequently filed a motion for change of venue or, in the alternative, to withdraw. R. 19-20; Resp. 12(M) ¶ 7. Telephonic change of venue hearings were held on April 25, 1996 and May 2, 1996. R. 24-33; Resp. 12(M) ¶ 8. On May 2, 1996, an order changing venue to Chicago was entered, over INS' objections. R. 21, 27-33; Am. Pet. ¶ 19; Resp. 12(M) ¶ 8.

The INS proceedings resumed in Chicago. On June 5, 1996, the immigration judge ordered Laguerre released from custody on a $5,000 bond. R. 22-23; Am. Pet. ¶ 19; Resp. 12(M) ¶ 9. On October 3, 1996, Laguerre was afforded a deportation hearing before an immigration judge in Chicago. R. 34-53; Am. Pet. ¶ 19. At the hearing, Laguerre acknowledged his conviction for delivery of a controlled substance containing cocaine. R. 14, 38-39. Initially, however, he denied his conviction for delivery of a controlled substance containing cocaine within 1000 feet of a public school in violation of 720 ILCS 570/401(C)(2) and 407(B)(1). R. 39; Resp. 12(M) ¶ 10. At that point, INS introduced Laguerre's certified record of convictions from the Circuit Court of Cook County. R. 2-8, 39. Shortly thereafter, it became apparent that Laguerre's initial reluctance to admit the conviction was not based on any

substantive rationale, but on the technical accuracy of the use of a small b in place of a capital B in the citation to 720 ILCS 570/407(B)(2) on the INS form I-831 (the charge form appended to the order to show cause). R. 14, 38-40. With Laguerre's consent, the immigration judge amended the charge form by hand to accord with Laguerre's contention that the citation required a capital B. R. 14, 40.

Next, Laguerre conceded deportability on both charges. R. 40-41; Resp. 12(M) ¶ 10. Laguerre then sought to apply for a waiver of deportability pursuant to section 212(c) of the INA [codified at 8 U.S.C. § 1182(c)]. R. 41; Am. Pet. ¶ 22; Resp. 12(M) ¶ 13. The INS opposed Laguerre's waiver application on the ground that § 440(d) of the AEDPA rendered him ineligible due to his convictions for an aggravated felony and controlled substance offense. R. 42; Resp. 12(M) ¶ 14.[4] The immigration judge

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[4] Prior to enactment of the AEDPA, criminal aliens could seek a discretionary waiver of deportation under section 212(c) of the INA. Section 212(c) stated in relevant part:

> Aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General . . . .

8 U.S.C. § 1182(c). Section 440(d) amended § 212(c) by adding language rendering criminal aliens in Laguerre's situation ineligible:

> This section shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are,

concurred with the INS position and held Laguerre statutorily ineligible to apply for a waiver of deportation. R. 45, 48-52; Am. Pet. ¶ 23; Resp. 12(M) ¶ 15. Accordingly, the immigration judge entered an order deporting Laguerre to Haiti. *Id.*

Laguerre filed a timely appeal of the deportation order to the Board of Immigration Appeals ("BIA"). R. 54-55; Am. Pet. ¶ 24; Resp. 12(M) ¶ 16. He argued that the immigration judge erred in denying his request to file the 212(c) petition because the legislative changes do not apply retroactively to his case. R. 54-55; Am. Pet. ¶ 24. On August 1, 1997, the BIA rendered a *per curiam* decision affirming the immigration judge and dismissing Laguerre's appeal. R. 56; Am. Pet. ¶ 25; Resp. 12(M) ¶ 16.

On November 5, 1997, the INS notified Laguerre to report for deportation to Haiti on November 25. Am. Pet. ¶ 27; Resp. 12(M) ¶ 17. On Thursday, November 20, Laguerre visited the INS office in Chicago to request an extension of time to depart the United States. Am. Pet. ¶ 27. He was taken into INS custody that day. Am. Pet. ¶ 27; Resp. 12(M) ¶ 17. He is currently detained under INS authority at the DuPage County Jail in Wheaton, Illinois. Am. Pet. ¶ 28. He filed the first petition for writ of habeas corpus on November 24, 1997. An amended petition was filed on December 24, 1997.

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without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i).

DISCUSSION

I. JURISDICTION

The court must first address whether the jurisdictional restrictions enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996), deprive it of subject matter jurisdiction over Laguerre's petition for a writ of habeas corpus. Laguerre alleges jurisdiction under 28 U.S.C. § 2441, Art. I, § 9 cl. 2 of the Constitution, and 28 U.S.C. § 1331. Respondents contend that section § 242(g) of the INA, 8 U.S.C. § 1252(g), as amended by § 306(a) of IIRIRA, requires dismissal of the petition for lack of subject matter jurisdiction. Laguerre asserts, in essence, that despite IIRIRA's significance for judicial review of final orders of deportation, the court retains jurisdiction to consider the merits of habeas petitions pursuant to § 2441 because Congress did not affirmatively repeal habeas review under that statute. Alternatively, Laguerre invokes jurisdiction under the Suspension Clause of Article 1, section 9, clause 2 of the Constitution.

A. LEGISLATIVE BACKGROUND

The jurisdictional provisions of the INA have recently undergone a rapid succession of legislative amendments, all aimed at curtailment of federal court jurisdiction over INS administrative decisions and adjudications. In particular, Congress has taken steps apparently intended to limit the federal courts' jurisdiction over petitions for habeas corpus involving INS matters.

First, Congress enacted the AEDPA on April 24, 1996. Pub. L. No. 104-132, 110 Stat. 1214 (1996). Section § 404(e) of the AEDPA eliminated the INA provision governing habeas corpus review of deportation proceedings. Formerly, INA § 106(a)(10) provided: "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." 8 U.S.C. § 1105(a)(10) (1994). Section 404(a) of the AEDPA replaced § 106(a)(10) with the following provision: "Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), (D) [of the INA] . . . shall not be subject to review by any court." 110 Stat. 1214, 1276-77. Second, on September 30, 1996, Congress enacted IIRIRA. Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996). IIRIRA repealed § 106 of the INA and replaced it with a new INA § 242 entitled "Judicial Review of Orders of Removal." IIRIRA § 306, codified at 8 U.S.C. § 1252.[5] Specifically, IIRIRA § 306(a)(2)(C) replaced AEDPA § 404(a). The new provision reads: "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense . . . . " INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

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[5] The IIRIRA replaces the familiar term "deportation" with the term "removal."

B. APPLICABLE JURISDICTIONAL PROVISION

Instead of relying on IIRIRA § 306(a)(2)(C), respondents premise their subject matter jurisdiction argument on the effect of IIRIRA's broad jurisdictional provision found in § 306(a). Section 306(a) creates a new section 242(g) of the INA, entitled "Exclusive Jurisdiction." 8 U.S.C. § 1252(g). The new section provides:

> Except as provided in this section and notwithstanding any other provisions of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

8 U.S.C. § 1252(g). Laguerre does not directly challenge respondents' argument that the language of this section encompasses his claims. Rather, Laguerre raises the issue whether his petition is governed by § 242(g), as opposed to IIRIRA's transitional rules, which the statute makes applicable to persons in deportation proceedings commenced before April 1, 1997. *See* IIRIRA § 309.

Laguerre's argument raises a question of statutory construction: whether IIRIRA § 242(g) or IIRIRA's transition provisions, specifically § 309(c)(4)(G), govern the court's subject matter jurisdiction over the petition. A resolution of this question depends on both the relative effective dates of IIRIRA's statutory provisions and on their substantive scope. In general, the effective date of IIRIRA's amendments is "the first day of the first month beginning more than 180 days after the date of enactment

[September 30, 1996]" or April 1, 1997. § 309(a). Yet, § 309(c) creates transitional rules delaying implementation of IRRIRA's amendments for aliens in exclusion or deportation proceedings before April 1, 1997. In addition, § 309(a) excepts §§ 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) from the general effective date. The effective date provision for § 242(g) is found in § 306(c)(1). The section, as amended by technical corrections on October 11, 1996, Pub. L. 104-302, 110 Stat. 3656, 3657, provides:

> (c) EFFECTIVE DATE
>
> (1) IN GENERAL – Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection(a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

Although manifesting a clear intent that the provision be applied retroactively, Congress failed to provide a date for § 242(g). Thus, the question arises whether § 242(g) was meant to take effect on the date of IIRIRA's enactment, as opposed to April 1, 1997.

The Seventh Circuit resolved this issue in *Lalani v. Perryman*, 105 F.3d 334 (7th Cir. 1997) (per curiam). In *Lalani*, the government argued that § 242(g) took effect on the date of enactment and thus deprived the court of jurisdiction over the appeal. The Seventh Circuit rejected this construction of the statute. The Seventh Circuit recognized that to interpret the statute in this manner would render meaningless "the provisions of the IIRIRA [the

transition rules] deferring application of its procedures for six months . . . because [the court] would have no jurisdiction in all cases immediately." *Id.* at 336. Noting that § 306(c) refers back to § 309, the Seventh Circuit held that § 242(g) would not take effect until April 1, 1997 – the general effective date provision. Finally, unlike the other subsections, § 242(g) applies retroactively to past and pending deportation proceedings.

IIRIRA's transition provisions delay the implementation of IIRIRA's amendments governing judicial review, including § 306(a)(2)(C). *See Turkhan v. INS*, 123 F.3d 487, 489 (7th Cir. 1997) ("Section 309 of the II[RI]RA . . . makes these new judicial review provisions inapplicable to aliens who are in deportation proceedings [before] April 1, 1997"); *see also Yang v. INS*, 109 F.3d 1185, 1191 (7th Cir. 1997) ("the II[RI]RA covers removal proceedings begun during or after . . . April"). The transition provisions state, in relevant part:

> (c) TRANSITION FOR ALIENS IN PROCEEDINGS –
>
> > (1) GENERAL RULE THAT NEW RULES DO NOT APPLY. – Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before [April 1, 1997] –
> >
> > > (A) the amendments made by this subtitle shall not apply, and
> > >
> > > (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.
> >
> > . . . .

> (4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW – In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act [after October 30, 1996] notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary –
>
> . . . .
>
> (G) there shall be no appeal in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect on the date of enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

IIRIRA § 309(c). Provided Laguerre satisfies the criteria set forth above, he may benefit from the delayed implementation of the IIRIRA's more restrictive judicial review provisions.

Laguerre meets the statutory timing requirements for application of the transitional rules governing judicial review. First, his deportation proceedings commenced before April 1, 1997. Second, the deportation order became final after October 30, 1996. The BIA dismissed

Laguerre's appeal on August 1, 1997. On similar facts, courts have determined that § 309(c)(4)(G) is applicable. *See, e.g., Turkhan,* 123 F.3d at 488-89 (BIA denied motion to reopen on May 9, 1997); *Sandoval v. Reno,* Civ. No. 97-7289, 1997 U.S. Dist. Lexis 20976, *12-15 (ED. Pa. Dec. 30, 1997) (BIA dismissed appeal on July 16, 1997). Finally, because the transition rules only supersede contrary provisions of the pre-IIRIRA law, § 440(a) of the AEDPA (INA § 106(a)(10)) would also apply. *See Turkhan,* 123 F.3d at 489.

Respondents urge that application of § 242(g) is required and it precludes habeas review of Laguerre's petition. The difficulty with this argument is that if § 242(g) operated to divest the district court of jurisdiction over Laguerre's habeas petition, it would render superfluous IIRIRA's specific provision governing jurisdiction for review of criminal alien deportations. *See* § 306(a)(2)(C), codified at 8 U.S.C. § 1252(a)(2)(C). In addition, retroactive application of § 242(g) would thwart application of the related transition provision for aliens in deportation proceedings. *See* § 309(c)(4)(G). Two familiar maxims of statutory construction support application of the specific IIRIRA provision. First, the specific takes precedence over the general. *Resolution Trust Corp. v. Gallagher,* 10 F.3d 416, 420 (7th Cir. 1993). Second, a court is to give effect to all statutory provisions whenever possible. *See In re Lifschultz Fast Freight Corp.,* 63 F.3d 621, 628 (7th Cir. 1995); *see also United States v. Wagner,* 29 F.3d 264, 266 (7th Cir. 1994).

IIRIRA § 306(a)(2)(C) is entitled "Orders Against Criminal Aliens" and is located in a subsection of INA § 242 entitled "Matters Not Subject to Judicial Review." The language of this subsection mirrors the language of § 242(g). For instance, both provisions contain the core

phrase "notwithstanding any other provision of law, no court shall have jurisdiction." Just as § 242(g) seems gauged to divest federal courts of jurisdiction over all judicial review of administrative decisions or actions of the attorney general, including habeas corpus petitions, so does § 306(a)(2)(C) seem to divest federal courts of all judicial review of criminal alien deportations under enumerated sections. If the scope of § 242(g) is as broad as respondents claim, its application would render § 306(a)(2)(C) meaningless. Thus, in order to give full effect to the precise language of § 306(a)(2)(C), and the related transition provision, § 309(c)(4)(G), the court finds Laguerre's claims beyond the scope § 242(g). Laguerre's petition seeks habeas review of a final order of deportation based on his criminal alien status pursuant to INA §§ 241(a)(2)(A)(iii) and 241(a)(2)(B)(i).[6] His petition is only incidentally directed at a "decision or action of the Attorney General to commence proceedings, adjudicate

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[6] § 440(b) of the AEDPA amended 8 U.S.C. § 1101 by adding the following definition of order of deportation:

> (47)(A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that such an alien is deportable or ordering deportation.
>
> (B) The order described under subparagraph (A) shall become final upon the earlier of –
>
> (i) a determination by the Board of Immigration Appeals affirming such order or
>
> (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration appeals.

8 U.S.C. § 1101(a)(47).

cases, or execute removal orders." § 242(g). Accordingly, the broad terms of § 242(g) do not govern this case.

C. JURISDICTION PURSUANT TO § 2241

The next inquiry required is whether the court retains subject matter jurisdiction over Laguerre's petition pursuant to 28 U.S.C. § 2241, despite the restrictive language of both § 440(a) and its IIRIRA counterpart, § 309(c)(4)(G). No federal appellate court has directly reached this issue. Yet, a number of appellate courts have addressed the constitutionality of § 440(a)'s restrictions on appellate review. In concluding that Congress could constitutionally divest the appellate courts of jurisdiction over direct appeals from final deportation orders, a number of federal appeals courts have assumed the continuing availability of federal habeas relief. *See, e.g., Chow v. INS,* 113 F.3d 659, 669 (7th Cir. 1997) ("Thus, we cannot say that section 106(a) of the INA is Chow's only avenue of judicial review, and because other avenues for relief remain open, we hold that section 440(a) does not violate Chow's due process rights"); *Kolster v. INS,* 101 F.3d 785, 790-91 (1st Cir. 1996); *Hincapie-Nieto v. INS,* 92 F.3d 27, 30-31 (2d Cir. 1996); *Salazar-Haro v. INS,* 95 F.3d 309, 311 (3d Cir. 1996). Further, a growing majority of district courts across the nation, including this court, have already concluded that federal habeas relief remains available under § 2241. *Gutierrez-Martinez,* ___ F. Supp. ___, 97 CV3361TWT, 1998 WL 7459 (N.D. Ga. Jan. 8, 1998); *Morisath v. Smith,* ___ F. Supp. ___, No. C 97-12392, 1997 WL 797664 (WD. Wash. Dec. 23, 1997); *Mojica v. Reno,* 970 F. Supp. 130 (E.D.N.Y 1997); *Ozoanya v. Reno,* 968 F. Supp.

1 (D.D.C. 1997); *Vargas v. Reno*, 966 F. Supp. 1537 (S.D. Cal. 1997); *Yesil v. Reno*, 958 F. Supp. 828 (S.D.N.Y. 1997), *reconsid. den.*, 973 F. Supp. 372 (S.D.N.Y. 1997); *Dunkley v. Perryman*, No. 96 C 3570, 1996 WL 464191 (N.D. Ill. Aug. 7, 1996); *Mbiya v. INS*, 930 F. Supp. 609 (N.D. Ga. 1996); *Powell v. Jennifer*, 937 F. Supp. 1245 (E.D. Mich. 1996). Finally, in *Sandoval*, the district court reached the identical conclusion with respect to IIRIRA § 309(c)(4)(G). 1997 U.S. Dist. Lexis 20976.

The conclusion that habeas jurisdiction persists under § 2241 is mandated, in large part, by the Supreme Court's recent opinion in *Felker v. Turpin*, ___ U.S. ___, 116 S. Ct. 2333 (1996). In *Felker*, the Supreme Court addressed the effects of AEDPA's gatekeeping mechanism on the Court's original jurisdiction over habeas petitions. The challenged AEDPA provisions were designed to restrict the filing of successive habeas petitions. The Supreme Court premised its analysis of the AEDPA provision on the presumption against repeal of habeas corpus jurisdiction by implication. *Ex parte Yerger*, 8 Wall. 85, 19 L. Ed. 332 (1869). Finding no affirmative mention of the Court's authority to hear habeas petitions in Title I of the AEDPA or in the specific section restricting the Supreme Court's appellate jurisdiction, the Court declined to find a repeal of its jurisdiction over original petitions pursuant to § 2241 or § 2254.

Felker's presumption against repeal by implication compels the conclusion that the general language of § 440(a) does not eliminate subject matter jurisdiction over habeas corpus petitions pursuant to § 2241. *See, e.g., Yesil*, 958 F. Supp. at 838 ("Sections 401 and 440 of the AEDPA do not state that they repeal or amend section

2241; indeed, they do not mention section 2241 at all"); *Mojica*, 970 F. Supp. at 160 ("The AEDPA does not amend, or even mention, section 2241 of Title 28"). *Felker* applies with even greater force in the context of § 309(c)(4)(G) because Congress substituted the narrower term "appeal" for § 440(a)'s "review." *See Sandoval*, 1997 U.S. Dist. Lexis at 22-23; *see also Mojica*, 970 F. Supp. at 160. Accordingly, neither § 440(a), nor § 309(c)(4)(G), operates to preclude this court's exercise of jurisdiction over Laguerre's petition pursuant to § 2241.

Finally, the court must determine whether Laguerre meets the jurisdictional requirement of § 2241. First, Laguerre must be "in custody under or by color of the authority of the United States." 28 U.S.C. § 2241(c)(1). The parties agree that Laguerre is currently in INS custody. Second, Laguerre's petition alleges he is "in custody in violation of the Constitution [and] laws . . . of the United States." § 2241(c)(3). Accordingly, Laguerre has met the "in custody" requirement of jurisdiction of 28 U.S.C. § 2241, supporting subject matter jurisdiction.

II. TIMING OF CONCESSION OF DEPORTABILITY

Laguerre raises a factual issue about the timing of his concession of deportability. Laguerre contends he conceded deportability on two occasions prior to the enactment of the AEDPA on April 24, 1996. First, he contends that he conceded deportability in the initial motion to change venue filed in El Paso, Texas on April 11, 1996. Second, he suggests he conceded deportability at the bond hearing conducted on April 18, 1996. Respondents assert that the certified administrative record does not

support this claim. In respondents' view, Laguerre's concession of deportability was not made until the October 3, 1996 deportation hearing in Chicago.

The timing of the concession is relevant to Laguerre's substantive claims. If Laguerre conceded deportability prior to the enactment of AEDPA § 440(d), which rendered him ineligible to apply for a discretionary waiver of deportation, Laguerre could argue that § 440(d) was unconstitutionally retroactive as applied to his pending application for waiver under former INA § 212(c). In addition, he could properly seek to reopen the deportation proceedings in reliance on the Seventh Circuit's opinion in *Reyes-Hernandez v. INS*, 89 F.3d 490 (7th Cir. 1996). Thus, before ruling on the merits of these issues, the court addresses this factual dispute to determine whether there is factual support for Laguerre's contentions.

As regards Laguerre's first contention, respondents take the position that concessions of deportability are made only at formal deportation hearings, not in the context of change of venue motions. In response, Laguerre cites the BIA's decision in *Matter of Velasquez*, 19 I & N Dec. 377 (BIA 1986), for the general principle that an alien can concede deportability in a change of venue motion. *Velasquez* does stand for the proposition that a concession of deportability in a change of venue motion may be construed as a binding admission, and can therefore be used against the alien in a formal deportation proceeding. Nevertheless, the case is factually inapposite. In *Velasquez*, the alien's attorney submitted a change of venue motion admitting all of the factual allegations in the order to show cause and conceding deportability. 19

I & N at 378. Laguerre's change of venue motion admitted, at most, two components of the factual allegations in the order to show cause. R. 9-14.[7] Laguerre relies on the following statement, in the first paragraph of the motion to change venue, as his concession of deportability: "The Respondent was convicted on February 23, 1995, in the Circuit Court of Cook County, Illinois, and subsequently was sentenced to prison time in Illinois State Prison." R. 17. The paragraph simply admits that Laguerre was convicted on the date charged, February 23, 1995, and that the conviction was obtained in the Circuit Court of Cook County. These are basic components of paragraphs five and six in the order to show cause. R. 14. The motion does not admit key factual allegations of the order to

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[7] The INS order to show cause contained six factual allegations:

> 1) You are not a citizen or national of the United States.
>
> 2) You are a native of HAITI and a citizen of HAITI.
>
> 3) You entered the United States at or near MIAMI FL on or about 8/13/85.
>
> 4) At that time you entered as an immigrant.
>
> 5) You were, on 2/23/95, convicted in the Circuit Court of Cook County for the offense of Delivery of Controlled Substance (Cocaine), an aggravated felony, in violation of Chapter 720-570/401(C)(2) of the Illinois Revised Statutes.
>
> 6) You were, on 2/23/95, convicted in the Circuit Court of Cook County for the offense of Delivery of Controlled Substance [sic] an aggravated felony, in violation of 720-570/401(c)(2)/407(B) [as amended on 10/3/1996] (1) of the Illinois Revised Statutes.

R. 9,14.

show cause, such as the precise crimes for which Laguerre was convicted. Further, unlike *Velasquez*, the motion does not state that Laguerre concedes deportability based on the alleged offenses. Accordingly, the language in the motion to change venue can neither be construed as an admission of the factual allegations supporting his deportation, nor as an ultimate concession of deportability.

Next, Laguerre implies that his attorney conceded his deportability during a bond hearing conducted on April 18, 1996. The problem is that no transcript of that proceeding appears in the certified administrative record. Absent any evidence in the record, the court cannot speculate that Laguerre conceded deportability at that proceeding. In fact, the transcribed proceedings included in the administrative record clearly belie his assertion that a concession was made at the April 18 bond hearing.

To illustrate, on April 25, 1996, one day after the enactment of the AEDPA, the immigration judge in El Paso conducted a hearing. R. 24-26. Laguerre's counsel appeared telephonically. The judge asked Laguerre's counsel whether he was "requesting another week to prepare before entering a pleading in this case." R. 26. Laguerre's counsel answered "Yes, Your Honor." The judge concluded the hearing with a statement clearly indicating no concession had yet been made regarding deportability and a subsequent application for relief: "Then I will schedule the case for Thursday, May 2, 1996 at 11:00 a.m., or at any time thereafter that we can get to it, for the purpose of accepting pleadings, identifying applications for relief, and then scheduling the case for further actions as necessary." *Id.* At the May 2, 1996

hearing, however, the only issues covered were the merits of the motion to change venue. R. 27-33. The judge discussed the parties' respective positions and ruled in favor of Laguerre, ordering that venue be changed to Chicago. R. 32. In sum, the record of the El Paso proceedings does not support Laguerre's contention that he conceded deportability before the enactment of the AEDPA.

The Chicago proceedings further confirm that a concession of deportability was not made before April 24, 1996. The transcribed deportation proceedings resumed on October 3, 1996, over five months after the enactment of the AEDPA. Early in the hearing, the immigration judge posed this question to Laguerre's counsel: "And Mr. Butbul, in the change of venue [hearing] did you concede the allegations and the charge?" R. 36. Laguerre's counsel responded: "Well, we did it over the telephone so I do not remember at that time what has happened [sic]." *Id.* Further, at the point in the proceedings when the immigration judge invited formal pleadings, Laguerre's counsel initially refused to admit the factual allegations in paragraph six. R. 38-39. Although Laguerre's reluctance to admit the allegation was solely based on a clerical inaccuracy in his conviction record, it convincingly demonstrates that a formal pleading had not been submitted. Finally, after the minor clerical error in the conviction record was corrected, Laguerre conceded deportability. R. 40-41. Accordingly, Laguerre did not concede deportability until October 3, 1996.

III. RETROACTIVE APPLICATION OF § 440(d)

Prior to the passage of the AEDPA, Laguerre was eligible to apply for a waiver of deportation pursuant to § 212(c) of the INA, 8 U.S.C. 1182(c) (1994). Section 212(c) authorized the Attorney General to grant waivers of deportation to residents lawfully domiciled in the United States for at least seven years. In other words, the Attorney General could exercise her discretion to allow permanent residents, like Laguerre, to remain in the United States even after commission of a deportable offense. The enactment of § 440(d) of the AEDPA significantly reduced the Attorney General's discretion to grant applications for waiver of deportation. Specifically, the amendment rendered ineligible any alien who had committed: an aggravated felony; a controlled substance offense; certain firearm offenses; convictions of two crimes of moral turpitude; and miscellaneous crimes. AEDPA § 440(d), 110 Stat. 1214, 1277 (amending INA § 212(c), 8 U.S.C. § 1182(c)).

Laguerre's convictions in the Circuit Court of Cook County placed him in the aggravated felon and controlled substance offense categories of § 440(d). Relying on Laguerre's ineligibility for discretionary relief under AEDPA § 440(d), the immigration judge denied Laguerre's application for a waiver of deportation pursuant to former INA § 212(c). The BIA affirmed on this basis. Laguerre argues that the application of § 440(d) to his case is impermissibily retroactive in violation of the due process clause. Section 440(d) can only be viewed as retroactive as applied to Laguerre in two respects. First, § 440(d) could be unconstitutionally retroactive as applied to a pending application for relief. As discussed

above, Laguerre had no waiver application pending on the date of the AEDPA's enactment. Thus, the court need not decide whether § 440(d) was retroactively applied in that regard. Second, § 440(d) could be viewed as unlawfully retroactive as applied to criminal convictions that predate enactment of the AEDPA.[8] Laguerre's criminal convictions on February 23, 1995 predate enactment of the AEDPA.

In *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994), the Supreme Court reaffirmed the time-honored presumption against statutory retroactivity. In determining whether a statute applies retroactively, the core inquiry is "whether the new provision attaches new legal consequences to events completed before its enactment." 511 U.S. at 269-70. *Landgraf* established a two-part analytical framework to guide the court's determination of statutory retroactivity. First, the court must "determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 1505. The "requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id.* at 268. Provided Congress has taken this step, there is no need to further advance the inquiry. If, however, Congress failed to include an express statutory command specifying the statute's temporal reach, as is

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[8] The Seventh Circuit expressly left this issue open in *Reyes-Hernandez*, where the court stated it need not address "the applicability of [sections 440(a) and (d)] to criminal convictions or criminal acts that occurred before the [AEDPA] was passed." 89 F.3d at 493.

the case here, the court takes the next step. The court must consider "whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.*

In its survey of the jurisprudential history of the presumption against retroactivity, the Supreme Court identified a number of situations where application of new statutes to antecedent events is "unquestionably proper," even in the absence of a clear Congressional command. 511 U.S. at 273. The first illustration offered was statutes that authorize or affect the propriety of prospective relief, such as statutes altering the conditions for injunctive relief. Statutes creating or repealing jurisdiction were another notable example. The Court stated "[w]e have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." Id. at 274. Changes in procedural rules were another apt illustration. Because of the "diminished reliance interests in matters of procedure," these rules "may often be applied in suits arising before their enactment without raising concerns about retroactivity." Id. at 275. In sum, a statute does not have retroactive effect "merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." Id. at 269-70.

As an initial matter, Congress did not specify the temporal reach of § 440(d). The AEDPA contains no effective date provision governing § 440(d). The section is therefore deemed effective on the date of enactment. In

consequence, the court moves to the second part of the *Landgraf* analysis: whether § 440(d) violates the presumption against retroactivity. Respondents argue § 440(d) may be constitutionally applied to prior convictions because its amendment to § 212(c) is analogous to a jurisdictional statute or to one affecting the propriety of prospective relief. According to this interpretation, § 440(d) operates only prospectively, as a limitation on the Attorney General's authority to grant discretionary relief to a specified class of candidates for automatic deportation. Respondents find general support in *Landgraf* for this argument. Laguerre characterizes the effect of § 440(d) as retroactive. In Laguerre's view, the amendment to § 212(c) stripped him of a substantive cause of action – the right to apply for discretionary relief from deportation. Laguerre relies on the Supreme Court's recent decisions in *Hughes Aircraft Co. v. United States ex rel. Schumer*, ___ U.S. ___, 117 S. Ct. 1871 (1997) and *Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059 (1997).

Respondents' interpretation of § 440(d)'s effect finds overwhelming support in the plain language of the statute and in relevant precedent. The full test of INA § 212(c), as amended by § 440(d), reads:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this

> subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under § 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 1251(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1251(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 1251(a)(2)(A)(i) of this title.

8 U.S.C. § 1182(c). The provision plainly defines the contours of the Attorney General's discretion. In other words, § 440(d) makes aliens convicted of enumerated crimes ineligible for relief by limiting the Attorney General's discretion. Nothing in the express language of the provision lends itself to the argument that an application for a waiver is akin to a substantive cause of action. Indeed, unlike the statutory provisions at issue in *Hughes*, § 440(d) does not impair any rights Laguerre had in February 1995, when he committed the drug offenses for which he was convicted.[9] While at that time Laguerre

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[9] Both *Hughes* and *Lindh* are ultimately inapposite because they involved statutory provisions that added new legal consequences to a substantive cause of action. *Hughes* involved an amendment that expanded the scope of *qui tam* actions under the False Claims Act. The Court stated: "In permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action. . . . " 117 S. Ct. at 1878. *Lindh*, involved another section of the AEDPA governing standards of review applicable to habeas corpus petitions, 28 U.S.C. § 2254(d). The Supreme Court noted that "the statute goes beyond 'mere' procedure to affect substantive entitlement to relief." 117 S. Ct. at 2063.

could have applied for relief from automatic deportation, he could have claimed no settled expectation in the ultimate granting of discretionary relief. In sum, § 440(d) simply scaled back the Attorney General's prospective discretion to grant a particular form of relief.

This conclusion is bolstered by relevant authority. In *Matter of Soriano,* Int. Dec. 3289 (A.G. Slip. Op. Feb. 21, 1997), the Attorney General addressed whether § 440(d) is retroactive as applied to pending cases. The Attorney General opined that § 440(d) applied to pending cases because it "does not impair a right, increase a liability, or impose new duties on criminal aliens." *Id.* at 4. In arriving at that conclusion, the Attorney General labeled the relief sought in waiver applications as prospective in nature. She found support for this view in the Supreme Court's statement in *INS v. Lopez-Mendoza,* 468 U.S. 1032, 1038 (1984), that: "The deportation hearing looks prospectively to the respondent's rights to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain." *Id.* at 5. Furthermore, she compared § 440(d) to a jurisdictional statute because it "speaks to the power of the Attorney General to waive deportation," just as jurisdictional statutes speak to the power of the court. *Id.* Thus, she concluded § 440(d) would not be retroactive as applied to pending cases.[10]

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[10] In keeping with the Seventh Circuit's decision in *Reyes-Hernandez,* the Attorney General did carve out a narrow exception to the rule that § 440(d) applies in pending cases to allow aliens who conceded deportability prior to the enactment of the AEDPA, and who had a colorable defense to deportability, to reopen their cases. A.G. Slip. Op. at 8.

The federal appellate courts' analysis of the retroactivity of past Congressional amendments to § 212(c) is also instructive. Indeed, the AEDPA is not the first time Congress has rendered a class of felons ineligible for § 212(c) relief. The Immigration Act of 1990 rendered aggravated felons, who served at least five years in prison, ineligible to apply for a waiver. § 511(a), Pub. L. No. 101-649, 104 Stat. 4978, 5052 (1990). Aliens challenged the retroactivity of this provision as applied to convictions predating the enactment of the statute. The appellate courts uniformly rejected the contention that its application violated the presumption against retroactivity. *See, e.g., Scheidemann v. INS*, 83 F.3d 1517 (3d Cir. 1996); *Campos v. INS*, 16 F.3d 118 (6th Cir. 1994); *Barreiro v. INS*, 989 F.2d 62 (1st Cir. 1993); *Buitrago-Cuesta v. INS*, 7 F.3d 291 (2d Cir. 1993); *Osorio v. Fox*, 10 F.3d 1034 (4th Cir. 1993). In describing the nature of the interest effected [sic] by the statute, the courts rejected any claim of a reliance interest in the opportunity to apply for a waiver of deportation. *Kolster v. INS*, 101 F.3d 785, 789 (1st Cir. 1996) (citing cases). In particular, the Third Circuit in *Scheidemann* made the following decisive summary of the nature of discretionary relief under § 212(c):

> In this case, the consequences of petitioner's criminal conduct were clear at the time of that conduct and they remain unchanged today. He was subject to possible criminal sanctions and deportation. The only relevant change in the law relates to the permissible scope of the Attorney General's discretion to grant relief from one of those consequences. Like statutes altering the standards for injunctive relief, this change has only a prospective impact. It is not designed to

> remedy the past but only to affect petitioner's future status with respect to the legality of his presence in the United States. Like statutes constricting the jurisdiction of a judicial body, these changes speak only to the power of a public agency. Finally, like legislation altering procedural rights, the relevant amendments in this case regulate secondary rather than primary conduct and infringe on no significant reliance interest. Given the facts that petitioner's pre-1987 conduct clearly subjected him to deportation as well as criminal sanctions, and that § 212(c), as it then existed, offered relief from the former only at the unfettered discretion of the Attorney General, petitioner does not, and could not, contend that his conduct was undertaken in reliance on the then current version of § 212(c).

83 F.3d at 1523. Although the preclusive scope of § 440(d) is much broader than the scope of the 1990 amendment to § 212(c), the nature of discretionary relief remains the same. In both instances, "the availability of purely discretionary relief does not create substantive rights in otherwise deportable aliens." *Kolster,* 101 F.3d at 789.

Another relevant line of authority was recently discussed by the Seventh Circuit in *Chow v. INS,* 113 F.3d 659 (1997). In *Chow,* the Seventh Circuit faced the issue whether § 440(a)'s preclusion of appellate review violated the presumption against retroactivity as applied to pending cases and as to pre-AEDPA criminal conduct. In reaching the conclusion that § 440(a)'s withdrawal of judicial review did not "attach new legal consequences to the alien's [prior criminal] conduct," the court reasoned:

> Courts routinely hold that the INS may lawfully deport an alien under a statute which makes certain conduct a ground for deportation even if the alien engaged in the conduct before the statute went into effect. *Marcello v. Bonds*, 349 U.S. 302, 314, 75 S. Ct. 757, 764, 99 L.Ed. 1107 (1955) (allowing deportation based on conviction that was not a ground for deportation at the time the alien was convicted); *Hamama v. INS*, 78 F.3d 233, 235-36 (6th Cir. 1996) (same); *Ignacio v. INS*, 955 F.2d 295, 298 (5th Cir. 1992) (same); *United States v. Bodre*, 948 F.2d 28, 32-33 (1st Cir. 1991) (same). Accordingly, making deportation a consequence of certain criminal acts does not attach new liabilities or penalties to those acts.

113 F.3d 667. The present case presents an ever stronger claim for a finding of no retroactive effect than do those cited in *Chow*. This is because § 440(d) does not go so far as to alter the primary grounds for deportation. Aliens in Laguerre's particular situation are subject to deportation for the same set of criminal offenses. In sum, "§ 440(d) merely removes one potential means of avoiding deportation" for those offenses. *Gutierrez-Martinez*, 1998 WL at *5; *Vargas*, 966 F.Supp. at 1544.

Two courts have found § 440(d) to be retroactive as applied to criminal conduct predating the enactment of the AEDPA. Both courts have evinced great concern that the provision upsets settled expectations which form the basis for guilty pleas entered by criminal aliens. *See, e.g., Sandoval*, 1997 U.S. Dist. Lexis at *35; *Mojica*, 970 F.Supp. at 176-78. While it is undeniable that immigration consequences may be a factor in a decision to plead guilty, this court is not convinced by *Sandoval* or *Mojica* that the availability of discretionary relief under § 212(c) is the

sole or even a significant motivating factor in decisions to enter guilty pleas. It is a stretch to assume a criminal defendant would forgo a viable criminal defense in order to enter a guilty plea to a crime that makes him subject to automatic deportation, simply for the opportunity to apply for discretionary relief. If anything, the detriment associated with pleading guilty to a particular crime – exposure to deportation proceedings – would seem a substantial disincentive to the guilty plea; or, at the very least, an incentive to plea bargain to a conviction that carries no immigration consequences. Moreover, it is likely that the single greatest determinant in a criminal defendant's choice between a guilty plea and putting on a defense is the expected penal consequences of his actions. Nevertheless, one can imagine a hypothetical scenario where § 440(d) would seem to seriously frustrate the expectations of criminal aliens. *See Mojica,* 970 F.Supp. at 176. The presumption against retroactivity, however, affords no guarantee against upset expectations based in prior law. *Landgraf,* 511 U.S. at 1499. Rather, the question is whether § 440(d) attaches new legal consequences to Laguerre's criminal convictions. For the reasons stated above, this court answers that question in the negative.

IV. MOTION TO REOPEN DEPORTATION PROCEEDINGS

In *Reyes-Hernandez,* the Seventh Circuit recognized an exception to the applicability of § 440(a) and (d) to pending § 212(c) applications. 89 F.3d at 493. The court held that: "sections 440(a) and (d) do not apply to cases in which deportability was conceded before the [AEDPA]

became law, provided that the applicant for discretionary relief would have had at least a colorable defense to deportability; for if not, he lost nothing by conceding deportability." *Id.* Laguerre cannot avail himself of this limited exception to the application of § 440(d) precisely because he did not concede deportability prior to the date of the AEDPA's enactment. *See Arevalo-Lopez v. INS*, 104 F.3d 100, 101 (7th Cir. 1997) (*Reyes-Hernandez* did not apply where alien contested deportability at the prior hearing). Laguerre did not concede deportability and apply for § 212(c) relief until October 3, 1996, some five months after the date of enactment. Accordingly, there is no basis for granting Laguerre's motion to reopen the deportation proceedings to allow him the opportunity to contest his deportability.

CONCLUSION

Gary Laguerre's petition for writ of habeas corpus is denied. Respondents' motion to dismiss for lack of subject matter jurisdiction is denied. Respondents' motion to dismiss for failure to state a claim is moot. Respondents' motion for summary judgment is granted. Laguerre's cross motion for summary judgment is denied.

ENTER:

/s/ Suzanne B. Conlon
Suzanne B. Conlon
United States District Judge

February 17, 1998

APPENDIX J

United States District Court

Northern District of Illinois

Eastern Division

LA GUERRE

v.

RENO, et al.

JUDGMENT IN A CIVIL CASE

Case Number: 97 C 8225

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of respondents Janet Reno, Doris Meissner, and Brian Perryman and against petition [sic] Gary Laguerre.

Michael W. Dobbins, Clerk of Court

/s/ Jacquelyn H. Collier
Jacquelyn H. Collier,
Deputy Clerk

Date: 2/17/98

APPENDIX K

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A40 131 638 – Chicago Date: AUG 1 1997

In re: GARY LAGUERRE

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: David Butbul, Esquire
4051 Old Orchard Road
Skokie, Illinois 60076

ORDER:

PER CURIAM. You are seeking relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). However, you are statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") § 440(d); *Matter of Soriano*, Interim Decision 3289 (A.G., Feb. 21, 1997).

You have argued on appeal that your constitutional rights were violated because you were not warned of the potential immigration consequences of your guilty plea. We are without authority to rule on this argument. Neither the Immigration Judge nor this Board may go behind the record of conviction to determine the guilt or innocence of an alien, or the circumstances of his guilty plea and conviction. *See Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980).

For these reasons, your appeal is dismissed.

/s/ Neil P. Mille
FOR THE BOARD

APPENDIX L

U.S. DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

Office of the Immigration Judge

In the Matter of: Case No.: A 40 131 638

Gary Laguerre Docket: Chicago

RESPONDENT IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 10-3-96.

This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

[X] The respondent was ordered deported to Haiti.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered deported to _____ or in the alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____, with an alternate order of deportation to _____ or _____.

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for withholding of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for suspension of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for waiver under Section _____ of the Immigration and Nationality Act was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[X] Respondent's application for 212(c) was ( ) granted (X) denied ( ) withdrawn ( ) other.

[ ] Proceedings were terminated.

[ ] The application for adjustment of status under section (216) (216A) (245) (249) was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Other _____

[X] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

/s/ Illegible
Immigration Judge

Date: 10/3/96

Appeal: RESERVED/WAIVED (A/I/B)

_____

APPENDIX M

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Chicago, Illinois

File No.: A 40 131 638 October 3, 1996

In the Matter of)
GARY LAGUERRE) IN DEPORTATION
Respondent) PROCEEDINGS

CHARGE: Section 241(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended [8 U.S.C. 1251(a)(2)(A)(iii)] . . . anytime after entry you have been convicted of an aggravated felony . . .

Section 241(a)(2)(B)(a) of the Immigration and Nationality Act, as amended [8 U.S.C. 1251(a)(2)(B)(i)] . . . you have been convicted of a violation of . . . any law relating to a state, the United States, or a foreign country relating to a controlled substance . . .

APPLICATIONS: Waiver under Section 212(c) of the Act.

ON BEHALF OF RESPONDENT:

David Butbul, Esquire
4051 Old Orchard Road
Skokie, Illinois 60076

ON BEHALF OF SERVICE:

Lynn Hollander, Esquire
Assistant District Counsel, INS
10 West Jackson Boulevard
Suite 610
Chicago, Illinois 60604

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is an adult male, native and citizen of Haiti, who last entered the United States on or about August 13, 1985 at Miami, Florida as an immigrant. On February 23, 1995 the respondent was convicted in the circuit court of Cook County for the offense of delivery of controlled substance (cocaine), an aggravated felony, in violation of chapter 720-570/401(C)(2) of the Illinois revised statutes, and on the same date was convicted as well for an offense similar to allegation 5. Count 6 indicates that he was convicted as well on two counts relating to the same occurrence. (*See* Exhibit 6). The respondent was noticed to appear before the Court, having had a hearing initially in El Paso, Texas on April 25, 1996. The matter was continued and the venue was changed to Chicago for the respondent to have his day here. The Service, at that time, objected to the change of venue but apparently did not take an appeal of the interlocutory order of the court. The respondent appeared before the Court today. (*See* Exhibits 2, 3, 4, 5, and 6). The respondent, through counsel, admitted the factual allegations, as contained in the Order to Show Cause, conceded the charge of deportability and also permitted as Exhibit 6, the conviction record. Based on the foregoing, the Court finds deportability has been established by evidence which is clear, convincing, and unequivocal. *Woodby v. INS*, 385 U.S. 276 (1966); 8 C.F.R. 242.14(a).

The respondent, in lieu of an order of deportation, has designated Haiti as the country of deportation, if that were required. The respondent advised the Court that he wishes to apply for a waiver under Section 212(c) of the Act. The respondent's attorney believes that the current

law AEDPA, which is the Anti-Terrorism and Effective Death Penalty Act of 1996, public law 104-32, 110 statutes 1214, has been amended by the current law passed by Congress and signed by the President on September 30, 1996. The Service advises the Court that the effective date of the most recent Act will not take effect until April 1, 1997 and that, in fact, that Act has abrogated the relief of 212(c), as well as suspension of deportation, and has called the future action as cancellation of a removal proceedings, and that the deportation proceedings and exclusion proceedings have been now reclassified as removal proceedings, as such. And she urges the Court not to grant the respondent's motion for a continuance to brief the matter as being moot at this time. The Service urges the Court to note that the Court is bound by the law as it exists at the time of the hearing and may not consider any future actions that may occur. And, therefore, the Court will grant the Service's position that the respondent is not eligible to apply for the waiver, under Section 212(c) of the Act, because of the AEDPA.

We further note that the 7th Circuit, United States Circuit Court of Appeals for the 7th Circuit, has spoken in *Reyes-Hernandez v. INS*, 89 F.3d 490 (7th Cir. July 17, 1996), holding that Section 440(a) and (d), which bars judicial review of a 212(c) denials and makes most criminal aliens ineligible for a 212(c) relief and they should not apply to criminal aliens who concede deportability with an expectation to present a defense to that deportability prior to the enactment of AEDPA. We do note that the 7th Circuit's decision in that case was narrowly construed, and we do note that the applicant prior to the issuance of AEDPA becoming law had made the pleading. We note

that the respondent here, this case is distinguished because it is occurring after April 24, 1996, and counsel is presumed to know what the law is and that there is no expectation of a colorable relief from deportation under the current law. And, therefore, the Court notes that under these circumstances, his argument is not persuasive.

We note that *Matter of Soriano*, Int. Dec. 3289 (BIA June 27, 1996), was recently vacated by the Attorney General in her decision rendered on September 12, 1996, indicating that a prior application pending prior to the effective date of the Act would not be permitted to go forward as the Board had indicated, heretofore. We do note that the 5th and the 9th Circuit, apparently, has held that a 212(c) hearing is blocked by AEDPA. We note that in *Mendez-Rosas*, INS 1996 U.S. Apc. [sic] LEXIS 15319 (5th June 16, 1996), apparently held that AEDPA would block an application for a 212(c) waiver. We understand that the 9th Circuit has also similarly ruled in that arena as well. The 7th Circuit has not indicated the constitutionality of the Act and the Court notes that in *Lopez-Mendoza v. INS*, citation omitted, that the Supreme Court Justice Sandra Day O'Connor had indicated that neither the Immigration Judge nor the Board of Immigration Appeals has competency to rule in the area of constitutionality of an act of Congress. And the Court notes, therefore, that the presumption of regularity and constitutionality must prevail here.

Considering the above, the Court finds that it's meet [sic] and proper to enter the following order;

ORDER

IT IS HEREBY ORDERED that the respondent's request for a waiver under Section 212(c) of the Act be, and the same is hereby denied, since lack of eligibility.

IT IS FURTHER ORDERED that the respondent be deported from the United States to Haiti on the charges contained in the Order to Show Cause.

/s/ _____
O. JOHN BRAHOS,
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE O. JOHN BRAHOS

in the matter of:

GARY LAGUERRE

A 40 131 638

Chicago, Illinois

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Helen Lewis
(Helen Lewis, Transcriber)

Deposition Services, Inc.
600 East Jefferson Street
Suite 103
Rockville, Maryland 20852
(301) 738-1042

November 6, 1996
(Completion Date)

APPENDIX N

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

April 9, 1999

Before

Hon. Richard A. Posner, Chief Judge

Hon. Harlington Wood, Jr., Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

GARY LAGUERRE, *Petitioner-Appellant,* v. JANET RENO, et al., *Respondents-Appellees.* and JOSE MARTIN AVELAR-CRUZ, *Petitioner-Appellee,* v. JANET RENO, et al., *Respondents-Appellants.*	} Appeals from the United States District Court for the Northern District Illinois, Eastern Division. } Nos. 97 C 8225 and 98 C 1193 } Suzanne B. Conlon, *Judge.*

ORDER

On January 25, 1999, petitioners filed a petition for rehearing with suggestion for rehearing *en banc* and on February 10, 1999, respondents filed a [sic] answer. A vote of the active members of the Court was requested,

and a majority has voted to deny a rehearing en banc.* The petition is therefore **DENIED.**

---

* Hon. Kenneth F. Ripple, Hon. Ilana Diamond Rovner and Hon. Diane P. Wood voted to grant the petition for rehearing en banc.

APPENDIX O

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

(Filed April 20, 1999)

Date: December 22, 1998

BEFORE: Honorable RICHARD A. POSNER, Chief Judge

Honorable HARLINGTON WOOD, JR., Circuit Judge

Honorable DANIEL A. MANION, Circuit Judge

No. 98-1954

GARY LAGUERRE,

Petitioner - Appellant

v.

JANET RENO, DORIS MEISSNER and BRIAN R. PERRYMAN,

Respondents - Appellees

No. 98-2613

JOSE MARTIN AVELAR-CRUZ,

Petitioner - Appellee

v.

JANTE [sic] RENO, BRIAN PERRYMAN, DORIS MEISSNER, et al.,

Respondents - Appellants

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 97 C 8225 & 98 C 1193,
Suzanne B. Conlon, Judge

The judgment in LaGuerre's case is MODIFIED to base dismissal on want of jurisdiction, and the judgment in Alvelar-Cruz's [sic] case is REVERSED with instructions to dismiss the action, also for want of jurisdiction, in accordance with the decision of this court entered on this date.

APPENDIX P

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Suspension of Habeas Corpus Clause of the United States Constitution, Art. I, § 9, Cl. 2, provides:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. The Due Process Clause of the United States Constitution, Amend. V, provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

3. Article III of the United States Constitution, Art. III, § 1, provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

4. Prior to April 24, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (1995), provided in pertinent part:

> **Exclusiveness of Procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, United

States Code, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this title or pursuant to section 242A of this title or comparable provisions of any prior Act, except that –

* * *

(10) Habeas Corpus

Any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

5. Effective April 24, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a), provided in pertinent part:

Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that –

* * *

(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for

which both predicate offenses are covered by section [1251](a)(2)(A)(i), shall not be subject to review by any court.

6. Prior to April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1995), provided:

Nonapplicability of Subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

7. Effective April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), provided:

Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of

subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered by section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i).

8. Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268 (Apr. 24, 1996), provides:

> ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS. – Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) is amended –
>
> (1) in paragraph (8), by adding "and" at the end;
>
> (2) in paragraph (9), by striking "; and" at the end and inserting a period; and
>
> (3) by striking paragraph (10).

9. Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276 (Apr. 24, 1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996), provides in pertinent part:

CRIMINAL ALIEN REMOVAL.

(a) JUDICIAL REVIEW. – Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:

> "(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i), shall not be subject to review by any court."

* * *

(d) CLASSES OF EXCLUDABLE ALIENS. – Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended –

> (1) by striking "The first sentence of this" and inserting "This"; and
>
> (2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)."

10. Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625 (Sept. 30, 1996), as

amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996), provides in pertinent part:

EFFECTIVE DATES; TRANSITION.

(a) IN GENERAL. – Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5), this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

* * *

(c) TRANSITION FOR ALIENS IN PROCEEDINGS. –

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY. – Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective Date –

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

* * *

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW. – In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary –

* * *

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

11. Section 2241 of Title 28, United States Code, provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * *

(c) The writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

* * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

APPENDIX Q

[seal omitted]

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C. 20530

Matter of Soriano, BIA. Int. Dec. No. 3289 (1996)

IN DEPORTATION PROCEEDINGS

At the request of the Commissioner of Immigration and Naturalization, the Board of Immigration Appeals ("BIA") referred its decision in this matter pursuant to 8 C.F.R. § 3.1(h)(iii). Respondent Soriano, a native and citizen of the Dominican Republic, was admitted to the United States in 1985 as a lawful permanent resident alien. In 1992, he was convicted under New York law of the offense of an attempted sale of a controlled substance. Based on that conviction, the Immigration and Naturalization Service ("INS") instituted deportation proceedings against him in 1994.

In 1995, Respondent sought the relief of waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c). Section 212(c) grants the Attorney General discretionary authority to admit otherwise excludable permanent resident aliens. Although the statute expressly authorizes only a waiver of exclusion, courts have interpreted it to authorize relief in deportation proceedings as well. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976); *DeOsorio v. INS*, 10 F.3d 1034, 1039 (4th Cir. 1993). The Immigration Judge found that the respondent was eligible for that relief, but, in the exercise of discretion, denied his application. *See Matter of Soriano*, File No. A39 186 067 (Executive Office

for Immigration Review ("EOIR"), Office of the Immigration Judge, Oct. 12, 1995). Respondent appealed from that decision on October 23, 1995.

On April 24, 1996, while Respondent's appeal was pending, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). Section 440(d) of AEDPA amended INA § 212(c). The amendment provides in relevant part that section 212(c) relief shall not be available to aliens who are deportable by reason of having committed certain specified criminal offenses. Respondent's offense is among those specified.[11] Thus, a threshold issue on appeal was whether the amendment to section 212(c) applied to foreclose Respondent's application for relief from deportation.[12]

---

[11] The amendment provides in relevant part that section 212(c) relief shall not be available to an alien who "is deportable by reason of having committed any criminal offense covered in (INA) section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." 110 Stat. at 1277, as amended by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C., Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, 1996 U.S.C.C.A.N. Vol. 9B (110 Stat.) 1672. Respondent's offense is covered by sections 241(a)(2)(A)(iii) and (B) of the INA. *See* 8 U.S.C. § 1251.

[12] It is important to note as a threshold matter that deportation proceedings are civil actions, and, thus, the constitutional bars to retroactive application of penal legislation do not apply. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-95 (1952). Moreover, it is well settled that Congress may legislate to alter the

The BIA was unanimous in concluding that AEDPA § 440(d) was effective immediately upon enactment on April 24, 1996. The BIA was divided, however, as to whether AEDPA § 440(d) applied to applications for section 212(c) relief that were pending on the effective date of AEDPA. Six members of the BIA concluded that Congress did not intend that aliens who had applicants pending on April 24, 1996, should be barred from seeking that relief. Accordingly, they found that Respondent continued to be eligible for waiver of inadmissibility.[13] Five members of the BIA dissented. They would have held that section 440(d) did apply to pending applications for section 212(c) relief. One member of the BIA concurred in part and dissented in part. That member agreed with the majority that AEDPA § 440(d) should not be applied to pending section 212(c) applications, but would also have declined to apply it to other cases, such as those of permanent resident aliens subject to an Order to Show Cause.

For the reasons stated below, I conclude that the amendment to INA § 212(c) made by AEDPA § 440(d) applies to proceedings such as Respondent's, in which an

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immigration consequences of past criminal convictions or acts. *Lehman v. Carson*, 353 U.S. 685, 690 (1957); *Mulcahey v. Catalanotte*, 353 U.S. 692, 694 (1957).

[13] The majority agreed with the Immigration Judge's conclusions that Respondent's attempted criminal sale of cocaine, together with his three other drug-related felonies, required a demonstration of outstanding equities before he could receive a waiver of inadmissibility, and that Respondent had not made such a demonstration.

application for relief under section 212(c) was pending when AEDPA was signed into law.[14]

Analysis

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court sought to "reconcile two seemingly contradictory statements found in [the Court's] decisions concerning the effect of intervening changes in the law": that " 'a court is to apply the law in effect at the time it renders its decision,' " and that " '[r]etroactivity is not favored in the law.' " *Id.* at 263-64 (citations omitted).

The Court set forth the method for analyzing the temporal reach of a statute:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the

---

[14] By Order dated September 12, 1996, I granted the request for review and vacated the opinion of the BIA in Matter of Bartolome Jhonny Soriano (A39 186 067).

> statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 280.

In the present case, nothing in the language of the newly enacted statute, AEDPA § 440(d), specifies either that it is to be applied in pending deportation proceedings, or that it is not to be. Thus, the next task is to determine whether the statute would be given retroactive effect if applied in pending deportation proceedings. In this regard, the Court observed that "[w]hile statutory retroactivity has long been disfavored, deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Id.* at 268. A statute does not operate retroactively "merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-70 (citation and footnote omitted).

Of particular relevance here, the Court suggested that changes in the law affecting prospective relief, as well as those affecting jurisdiction and procedure, are generally not to be considered "retroactive." Specifically, the Court said:

> Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not

> retroactive. Thus, in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921), we held that § 20 of the Clayton Act, enacted while the case was pending on appeal, governed the propriety of injunctive relief against labor picketing. In remanding the suit for application of the intervening statute, we observed that "relief by injunction operates *in futuro*," and that the plaintiff had no "vested right" in the decree entered by the trial court.

Id. at 273-74.

Similarly, the three separately concurring Justices (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in the judgment), emphasized that intervening law was typically applied to pending applications for prospective relief:

> Courts traditionally withhold requested injunctions that are not authorized by then-current law, even if they were authorized at the time suit commenced and at the time the primary conduct sought to be enjoined was first engaged in. The reason, which has nothing to do with whether it is possible to have a vested right to prospective relief, is that "[o]bviously, this form of relief operated only *in futuro*." Since the purpose of prospective relief is to affect the future rather than to remedy the past, the relevant time for judging its retroactivity is the very moment at which it is ordered.

Id. at 293 (citations omitted).

Both the majority and concurring Justices identified another set of intervening statutes – those that confer or eliminate jurisdiction – that do not operate retroactively

merely because they are applied to conduct arising before the statute's enactment. Justice Scalia explained the Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction . . . by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power – so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." *Landgraf*, 511 U.S. 286, 292-93 (Scalia, J. concurring).[15]

In summary, under *Landgraf*, a new statute does not have retroactive effect if it does not impair rights a party possessed when he or she acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. More specifically, an intervening statute that either alters jurisdiction or affects prospective injunctive relief generally does not raise retroactivity concerns, and, thus, presumptively is to be

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[15] The single dissenting Justice in *Landgraf* was of the opinion that the presumption against retroactive legislation, "which serves to protect settled expectations," and which "is grounded in a respect for vested rights," "need not be applied to remedial legislation . . . that does not proscribe any conduct that was previously legal." *Id.* at 296-97 (Blackmun, J., dissenting) (citing *Sampeyreac v. United States*, 32 U.S. (7 Pet.) 222, 238 (1833) ("Almost every law, by providing a new remedy, affects and operates upon causes of action existing at the time the law is passed") and *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir.) ("Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known."), *cert. denied*, 449 U.S. 905 (1980)).

applied in pending cases. As discussed below, the application of AEDPA § 440(d) to pending applications for section 212(c) relief does not impair a right, increase a liability, or impose new duties or criminal aliens. The consequences of Respondent's conduct remain the same before and after the passage of AEDPA: criminal sanctions and deportation. AEDPA § [440(d)] is best understood as Congress's withdrawal of the Attorney General's authority to grant prospective relief. Thus, the statute alters both jurisdiction and the availability of future relief, and should be applied to pending applications for relief.[16]

The relief sought in a section 212(c) application, waiver of inadmissibility, is prospective in nature. A successful applicant for relief under section 212(c) will not,

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[16] One formulation articulated in *Landgraf* for determining whether a statute operates retroactively – "whether [it] attaches new legal consequences to events completed before its enactment" – could be interpreted as compelling the conclusion that AEDPA § [440(d)] should not be applied to pending applications for section 212(c) relief. *Id.* at 269-70. Because the statute eliminates eligibility for a previously available form of relief from the immigration consequences of a prior criminal conviction, it could be argued that it attaches new legal consequence to a prior event. Elimination of a form of relief in this context, however, is not the same as the attachment of new legal consequences in the sense that the Court meant in *Landgraf*. If it were, most cases in the three categories that the Court identified as not constituting retroactive application when applied to past events – statutes that alter jurisdiction, procedural rules, and statutes affecting the availability of prospective injunctive relief – would also have to be understood as attaching new legal consequences to prior events and, hence, constituting retroactive application.

as a matter of the sovereign's discretion, be deported from the country, even though his or her past criminal convictions would otherwise lead to deportation. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("The deportation hearing looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain."); *DeOsorio v. INS* 10 F.3d at 1042 (holding that an amendment barring applications for waivers of deportations filed after the effective date of the amendment to 212(c) is not made retroactive merely because it applies to convictions for aggravated felonies before that time: "The past aggravated felony conviction is only the prerequisite for the prospective denial of discretionary relief. . . . Congress did not attach additional consequences, but merely withdrew a previously available form of discretionary relief.").

Moreover, Congress's modification of section 212(c) operates to eliminate the discretionary authority of the Attorney General to grant relief in certain cases, and, thus, its effect is to remove jurisdiction. As the Solicitor General argued in the brief of the United States of the Supreme Court in *INS v. Elramly*, 73 F.3d 220 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1260, and *vacated*, 117 S. Ct. 31 (1996), a case raising the issue whether AEDPA divested the Attorney General of authority to grant section 212(c) relief in pending cases, "[j]ust as new 'jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties,' " *Landgraf*, 511 U.S. at 274, section 212(c) speaks to the power of the Attorney General to waive deportation, not to any right of an alien to such relief." Supplemental Brief for the

Petitioner at 18. The majority opinion in *Landgraf* explains the practice of applying new jurisdictional statutes to pending cases by the fact that "a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' " *Id.* at 274 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). Here, in contrast to the cases cited by the Court, there is no alternative tribunal to which the criminal alien may petition. Even assuming that the lack of an alternative tribunal would be relevant to retroactivity analysis where a substantive right is at stake, eligibility for a congressionally created form of purely discretionary relief from the immigration consequences of a prior criminal conviction cannot properly be characterized as a substantive right.[17]

The Third Circuit's discussion of the application of an earlier amendment to section 212(c) to make an applicant ineligible for relief based on a prior criminal conviction applies equally here:

> In this case, the consequences of petitioner's criminal conduct were clear at the time of that conduct and they remain unchanged today. He was subject to possible criminal sanctions and

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[17] The concurring opinion further notes that while there may sometimes be an alternative forum, there is not always one, and even where there is, it may deny relief for some collateral reason such as a statute of limitations bar. "Our jurisdiction cases are explained, I think, by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power – so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." *Landgraf*, 511 U.S. at 293 (Scalia, J. concurring).

> deportation. The only relevant change in the law relates to the permissible scope of the Attorney General's discretion to grant relief from one of those consequences. Like statutes altering the standards for injunctive relief, this change has only a prospective impact. It is not designed to remedy the past but only to affect petitioner's future status with respect to the legality of his presence in the United States. Like statutes constricting the jurisdiction of a judicial body, these changes speak only to the power of a public agency. . . . Given the facts that petitioner's pre-1987 conduct clearly subjected him to deportation as well as criminal sanctions, and that § 212(c), as it then existed, offered relief from the former only at the unfettered discretion of the Attorney General, petitioner does not, and could not, contend that his conduct was undertaken in reliance on the then current version of § 212(c).

Scheidemann v. INS, 83 F.3d 1517, 1523 (3rd Cir. 1996).

The Seventh Circuit has expressed a contrary view in *Reyes-Hernandez v. INS*, 89 F.3d 490 (7th Cir. 1996), at least with respect to a narrow category of cases. In that case the petitioner had conceded deportability before the enactment of AEDPA, when he was still eligible for section 212(c) relief. The court speculated that had the petitioner known that this relief would no longer be available to him, he might have contested deportability.

> Considering the fell consequences of deportation, especially in cases of exceptional hardship, which are precisely the cases in which an appeal to section 212(c) would have a chance of success, we think it unlikely that Congress intended to mousetrap aliens into conceding deportability

> by holding out to them the hope of relief under section 212(c) only to dash that hope after they had conceded deportability. No such ignoble intention appears in the statute. Its absence is determinative under *Landgraf* because to make the concession of deportability a bar to relief under section 212(c) would be to attach a new legal consequence to the concession, an event that occurred before the new law came into existence.

Id. at 492-93. The court held that section 440(d) of AEDPA does not apply to cases in which deportability was conceded before AEDPA became law, "provided that the applicant for discretionary relief would have had at least a colorable defense to deportability; for if not, he lost nothing by conceding deportability." *Id.* at 493.[18]

Amici curiae in the current case also emphasized the reliance aliens may have placed on the availability of section 212(c) relief. Amici argue that aliens may rely on the possibility of obtaining section 212(c) relief not only when deciding whether to contest deportability, but also when deciding whether to litigate their criminal liability or enter into a plea agreement. It is true that the majority opinion in *Landgraf* notes that "familiar considerations of fair notice, reasonable reliance, and settled expectations" are factors offering "sound guidance" in "hard cases." *Landgraf*, 511 U.S. at 270. However, the Court states

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[18] The Seventh Circuit has confirmed that *Reyes-Hernandez* applies only in cases where the petitioner conceded deportability and had a colorable defense to deportability. *Arevalo-Lopez v. INS*, No. 96-1754, 1997 WL 1898, at *2 (7th Cir., Jan. 3, 1997).

expressly that a statute does not operate retroactively merely because it "upsets expectations based in prior law." *Landgraf*, 511 U.S. at 270.

In any event, it is difficult to see how the possibility of obtaining section 212(c) relief would affect an alien's decision whether to concede or contest deportability. First, the criteria for determining whether someone is deportable as a criminal alien are specific and fixed, and the grounds for challenging deportability are quite narrow. *See Rabiu v. INS*, 41 F.3d 879, 881 (2d Cir. 1994) (record of conviction sufficient to overcome alien's challenge to deportability); *Ortega de Robles v. INS*, 58 F.3d 1355, 1358 (9th Cir. 1995) (criminal convictions may not be collaterally challenged in deportation proceeding as ground for contesting deportability). Second, an alien need not choose between contesting deportability and seeking section 212(c) relief; an alien may pursue both.

It seems more plausible that an alien may enter a plea bargain hoping to obtain relief from deportation, but even so, the alien could not have reasonably relied upon the availability of that relief. For the past forty years, the law has been settled that Congress may legislate to alter the immigration consequences of past criminal convictions or acts. Moreover, as the Supreme Court recently unanimously reaffirmed in the context of analyzing a similar provision conferring discretionary authority upon the Attorney General, "suspension of deportation [is] . . . 'an act of grace' which is accorded pursuant to her 'unfettered discretion' and is similar to 'a judge's power to suspend the execution of a sentence, or the President's to pardon a convict.' " *INS v. Yueh-Shaio Yang*, 117 S. Ct.

350, 352-53 (1996) (citations omitted). Therefore, a criminal alien could not reasonably rely on the availability of section 212(c) relief in determining whether to plead guilty to a criminal offense or in determining whether to concede deportability.

Accordingly, the application of AEDPA § 440(d) to section 212(c) applications pending before the EOIR would not be retroactive. However, to eliminate even the remote possibility that an alien who had a colorable defense to deportability may have conceded deportability in reliance on the availability of section 212(c) relief, I direct the EOIR to reopen cases upon petition by an alien who conceded deportability before the effective date of AEDPA for the limited purpose of permitting him or her to contest deportability.

CONCLUSION

For the foregoing reasons, AEDPA § 440(d) should be applied to INA § 212(c) cases pending before the EOIR on the effective date of AEDPA. EOIR shall reopen cases upon petition by an alien who conceded deportability before April 24, 1996, the effective date of AEDPA, for the limited purpose of permitting the alien to contest deportability.

Date: February 21, 1997

/s/ JANET RENO
JANET RENO
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Supreme Court, U.S.
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No. 99-418

In the Supreme Court of the United States

GARY LAGUERRE AND JOSE MARTIN AVELAR-CRUZ,
PETITIONERS

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district courts' authority to entertain challenges to the merits of final orders of deportation on petitions for a writ of habeas corpus was divested by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, including Sections 401(e) and 440(a) of AEDPA (110 Stat. 1268, 1277), which repealed the Immigration and Nationality Act's former provision for habeas corpus in 8 U.S.C. 1105a(a)(10) (1994), and replaced it with a provision precluding judicial review of deportation orders entered against aliens convicted of certain criminal offenses.

2. Whether the Attorney General permissibly concluded that Section 440(d) of AEDPA (110 Stat. 1277), which made aliens convicted of certain criminal offenses ineligible for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994), should apply in the cases of aliens who had already filed applications for relief under Section 1182(c) as of the date of AEDPA's enactment.

3. Whether 8 U.S.C. 1182(c) (1994), as amended by Section 440(d) of AEDPA, violates constitutional principles of equal protection because it precludes discretionary relief only for aliens convicted of certain offenses who are placed in deportation proceedings in the United States, and not also aliens convicted of similar crimes who are placed in exclusion proceedings when returning from a trip abroad.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 164 F.3d 1035. The memorandum opinion and order of the district court denying habeas corpus to petitioner LaGuerre (Pet. App. 71a-103a) is unreported. The memorandum opinion and order of the district court granting habeas corpus to petitioner Avelar-Cruz (Pet. App. 14a-47a) is reported at 6 F. Supp. 2d 744. The decisions and orders of the Board of Immigration Appeals (Pet. App. 48a-49a, 104a-105a) and the immigration judge (Pet. App. 50a-59a, 106a-112a) with respect to both petitioners are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1998. Pet. App. 115a-116a. A petition for rehearing was denied on April 9, 1999. Pet. App. 113a-114a. On June 28, 1999, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including September 6, 1999, and the petition was filed on September 7, 1999 (the day after Labor Day). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1996, Congress enacted several major changes to the Nation's immigration laws. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining the process of judicial review of their deportation orders. Two enactments are pertinent to this case: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996).

a. Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could apply to the Attorney General for discretionary relief from deportation. To be eligible for such relief, the alien had to show that he had a lawful unrelinquished domicile in this country for seven years, and that, if his conviction was for an "aggravated felony," as defined in the Immigration and Nationality Act (INA), he had not served a term of imprisonment for that conviction of five years or longer. See 8 U.S.C. 1182(c)

(1994) (repealed 1996).[1] If the Attorney General, in the exercise of her discretion under Section 1182(c), denied relief from deportation, then the alien could challenge that denial by filing a petition for review of his final deportation order in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (repealed 1996) (incorporating 28 U.S.C. 2341-2351). Under certain circumstances an alien in custody pursuant to an order of deportation could seek judicial review thereof by filing a petition for a writ of habeas corpus in district court, pursuant to 8 U.S.C. 1105a(a)(10) (1994) (repealed 1996).

In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from deportation and the availability of judicial review of criminal aliens' deportation orders. First, on April 24, 1996, Congress enacted AEDPA into law. As to substantive eligibility for relief, Section 440(d) of AEDPA, 110 Stat. 1277, amended 8 U.S.C. 1182(c) to make certain classes of criminal aliens categorically ineligible for discretionary relief from deportation under Section 1182(c)—including aliens who were deportable because they had been convicted of aggravated felonies or of controlled substance offenses. See 8 U.S.C. 1251(a)(2)(A)(iii) and (B)(i) (1994). As to judicial review, Section 401(e) of AEDPA—in a provision entitled "Elimination of Custody Review by Habeas Corpus"—repealed the previous version of 8 U.S.C. 1105a(a)(10) (1994), which had

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[1] Although Section 1182(c) by its terms applied only to aliens who had temporarily proceeded abroad and were returning to their domicile in the United States, it had been interpreted, in response to the Second Circuit's decision in *Francis* v. *INS*, 532 F.2d 268 (1976), also to permit the Attorney General to waive the grounds of deportation of lawfully admitted permanent resident aliens who were present in the United States and in deportation proceedings. See *In re Silva*, 16 I. & N. Dec. 26 (B.I.A. 1976); *Gonzalez* v. *INS*, 996 F.2d 804, 806 (6th Cir. 1993); *Ashby* v. *INS*, 961 F.2d 555, 557 & n.2 (5th Cir. 1992); *Tapia-Acuna* v. *INS*, 640 F.2d 223 (9th Cir. 1981).

specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. 110 Stat. 1268. Section 440(a) of AEDPA, 110 Stat. 1276-1277, replaced that habeas corpus provision with a new 8 U.S.C. 1105a(a)(10), which provided that any final order of deportation against an alien who was deportable for having committed certain criminal offenses "shall not be subject to review by any court." 110 Stat. 1277.

On September 30, 1996, Congress enacted IIRIRA, which comprehensively amended the INA. IIRIRA repealed 8 U.S.C. 1182(c) on a prospective basis, see IIRIRA § 304(b), 110 Stat. 3009-597, and replaced it with a new form of discretionary relief known as "cancellation of removal," see 8 U.S.C. 1229b (Supp. IV 1998). The cancellation of removal provisions, however, were made applicable only to aliens who are placed in removal proceedings on or after April 1, 1997, and therefore do not govern petitioners' cases. See IIRIRA § 309(a) and (c)(1), 110 Stat. 3009-625. For cases commenced prior to April 1, 1997, including petitioners' cases, IIRIRA retained the prior 8 U.S.C. 1182(c)—including the amendment made by Section 440(d) of AEDPA that made certain classes of criminal aliens ineligible for relief under Section 1182(c).

IIRIRA also replaced the INA's judicial review provisions in 8 U.S.C. 1105a (1994) with a new 8 U.S.C. 1252 (Supp. IV 1998), again for cases in which the administrative proceedings were commenced on or after April 1, 1997. See IIRIRA § 309(c)(1), 110 Stat. 3009-625.[2] Cases in which the admin-

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[2] The new Section 1252 provides for judicial review of all final removal orders in the courts of appeals, see 8 U.S.C. 1252(a)(1) (Supp. IV 1998) (incorporating 28 U.S.C. 2341-2351), with a limited exception for aliens subject to removal without a hearing under 8 U.S.C. 1225(b)(1) (Supp. IV 1998), for whom limited review by means of habeas corpus is available, see 8 U.S.C. 1252(a)(1) and (e)(2) (Supp. IV 1998). Section 1252 also carries forward the preclusion of review in former Section 1105a(a)(10) (as

istrative proceedings were commenced prior to April 1, 1997, however, continue to be governed by 8 U.S.C. 1105a, as amended by AEDPA. See IIRIRA § 309(c)(2), 110 Stat. 3009-625. Congress enacted special rules for any such cases in which the final deportation order was entered on or after October 31, 1996. One of those special rules, in Section 309(c)(4)(G) of IIRIRA, reinforces the preclusion of judicial review in amended 8 U.S.C. 1105a(a)(10) by providing that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed [specified criminal offenses]." 110 Stat. 3009-626.

b. After the enactment of these changes to the immigration laws, two questions arose in immigration proceedings about the scope of Section 440(d) of AEDPA, barring certain criminal aliens from relief under 8 U.S.C. 1182(c).

First, the question arose as to whether Section 440(d) applies to aliens who were placed in deportation proceedings before the enactment of AEDPA. On June 27, 1996, the Board of Immigration Appeals (BIA) initially decided that AEDPA § 440(d) does apply to deportation proceedings that had already been initiated, but that it should not be applied to aliens who had already filed applications for Section

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amended by AEDPA § 440(a)) by providing that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" a crime within several classes of criminal offenses. 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998). The new Section 1252(b)(9) further provides sweepingly that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section"—*i.e.*, only in the court of appeals, as provided in Section 1252(a)(1).

1182(c) relief before AEDPA's enactment. *In re Soriano*, Int. Dec. No. 3289.[3]

The Attorney General, exercising her authority under 8 C.F.R. 3.1(h), vacated the BIA's opinion in *Soriano* and certified for her decision the question whether AEDPA § 440(d) applies to applications filed as of the date of its enactment. On February 21, 1997, the Attorney General concluded in *Soriano* that Section 440(d) applies to all deportation proceedings pending on (or commenced after) the date of AEDPA's enactment, including those proceedings in which aliens had already submitted applications for Section 1182(c) relief on the date of enactment. Pet. App. 125a-138a. Following the analytical framework set forth by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the Attorney General concluded that application of Section 440(d) to pending deportation cases is not retroactive because it does not "impair a right, increase a liability, or impose new duties on criminal aliens. The consequences of [the alien's] conduct remain the same before and after the passage of AEDPA: criminal sanctions and deportation." Pet. App. 132a. The Attorney General also concluded that AEDPA § 440(d) may be understood as "Congress's withdrawal of the Attorney General's authority to grant prospective relief. Thus, the statute alters both jurisdiction and the availability of future relief, and should be applied to pending applications for relief." *Ibid.*

Second, the question arose whether AEDPA § 440(d) bars the Attorney General from granting Section 1182(c) relief to criminal aliens who temporarily proceeded abroad, seek

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[3] Eleven of the 12 members of the BIA concluded that AEDPA § 440(d) applies to pending deportation proceedings commenced before AEDPA was enacted. Those 11 divided only on whether Section 440(d) applies to aliens who had already applied for relief under 8 U.S.C. 1182(c) before AEDPA was enacted; six of the 11 concluded that it does not.

admission to the United States, and are placed in exclusion proceedings, as well as to criminal aliens in the United States who are placed in deportation proceedings. The BIA concluded in *In re Fuentes-Campos*, Int. Dec. 3318 (May 14, 1997), and *In re Gonzalez-Camarillo*, Int. Dec. 3320 (June 19, 1997), that AEDPA § 440(d) bars relief only for criminal aliens placed in deportation proceedings in the United States.

2. a. Petitioner LaGuerre is a native and citizen of Haiti who was lawfully admitted to the United States as a permanent resident alien on August 13, 1985. On February 23, 1995, LaGuerre was convicted of delivery of a controlled substance containing cocaine, and of delivery of a controlled substance containing cocaine within 1000 feet of a school. Pet. App. 72a. On December 19, 1995, the Immigration and Naturalization Service (INS) commenced deportation proceedings against LaGuerre, charging him with deportability based on his convictions for an aggravated felony (see 8 U.S.C. 1251(a)(2)(iii)(1994))[4] and a controlled substance offense (see 8 U.S.C. 1251(a)(2)(B)(i) (1994)). Pet. App. 73a.

On April 24, 1996, before LaGuerre had his deportation hearing, the President signed AEDPA into law. On October 3, 1996, at his deportation hearing, LaGuerre conceded that he was deportable on the basis of his drug-related convictions, but he applied for relief from deportation under Section 1182(c). An immigration judge (IJ) found LaGuerre statutorily ineligible for such relief based on AEDPA § 440(d). Pet. App. 109a-112a. LaGuerre appealed to the BIA, which affirmed on August 1, 1997, based on the Attorney General's decision in *Soriano*, *supra*. See *id.* at 104a-105a.

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[4] The INA defines "aggravated felony" to include illicit trafficking in a controlled substance. 8 U.S.C. 1101(a)(43)(B) (1994 & Supp. IV 1998).

b. On November 24, 1997, LaGuerre filed a petition for a writ of habeas corpus in district court. He alleged that the district court had jurisdiction under 28 U.S.C. 2241, the general federal habeas corpus statute, as well as the Suspension of Habeas Corpus Clause of the Constitution, Art. I, § 9, Cl. 2. He contended that the Board's denial of his application for relief under Section 1182(c) based on AEDPA § 440(d) was an improper retroactive application of the amendment made by AEDPA. Pet. App. 71a.

The district court denied the habeas corpus petition. Pet. App. 71a-102a. The court ruled (id. at 77a-87a) that it had jurisdiction under 28 U.S.C. 2241. On the merits, however, the court upheld the Attorney General's application of AEDPA § 440(d) to cases pending at its enactment, concluding that such application was not impermissibly retroactive because Section 440(d) withdrew the Attorney General's authority to grant discretionary relief after its enactment date. *Id.* at 88a-102a. LaGuerre appealed to the Seventh Circuit.

3. a. Petitioner Avelar-Cruz is a native and citizen of Mexico who entered the United States unlawfully in 1975. On September 25, 1987, Avelar-Cruz became a lawful temporary resident of the United States pursuant to the legalization provisions of 8 U.S.C. 1255a (1994 & Supp. IV 1998). On May 10, 1989, he became a lawful permanent resident alien. Pet. App. 15a.

On September 7, 1993, Avelar-Cruz was convicted of possession of a controlled substance with intent to deliver and delivery of a controlled substance. As a result of those convictions, the INS charged Avelar-Cruz with deportability as an alien convicted of an aggravated felony and a controlled substance violation. At a hearing on June 20, 1994, an IJ found Avelar-Cruz deportable based on his convictions, and further found him statutorily ineligible for relief under Section 1182(c) because he had not satisfied one of the statutory

prerequisites for such relief, *viz.*, seven years' lawful domicile in the United States. The BIA affirmed the IJ's decision. Pet. App. 15a-16a.

On June 27, 1995, the Seventh Circuit reversed the BIA's determination that Avelar-Cruz had not accumulated seven years' lawful domicile in the United States, and remanded the case to the BIA. Pet. App. 62a-70a. On February 7, 1996, the BIA remanded the case to an IJ to adjudicate Avelar-Cruz's application for relief under Section 1182(c). *Id.* at 60a-61a. While the case was pending on remand before the IJ, the President signed AEDPA into law.

On November 18, 1996, the IJ denied Avelar-Cruz's request for Section 1182(c) relief on the ground that AEDPA § 440(d) had made him statutorily ineligible for such relief. Pet. App. 50a-57a. On January 8, 1998, the BIA affirmed the IJ's decision, based on *Soriano*. *Id.* at 48a-49a.

b. On February 25, 1998, Avelar-Cruz filed a petition for a writ of habeas corpus in district court. Like LaGuerre, he invoked the district court's jurisdiction under 28 U.S.C. 2241 and the Suspension of Habeas Corpus Clause, and argued that the Attorney General's decision in *Soriano* was contrary to the presumption against retroactive application of federal statutes. He also argued that, if AEDPA § 440(d) were applied to pending cases such as his, then it would contravene equal-protection principles, because it bars relief only to aliens who are in the United States and placed in deportation proceedings and not to aliens returning to the United States from a temporary trip abroad and facing potential exclusion from the United States.

On April 27, 1998, the district court granted the habeas corpus petition. The district court concluded, as it had in *LaGuerre*, that it had jurisdiction under 28 U.S.C. 2241 to review the BIA's final deportation order (Pet. App. 20a-28a), and that Section 440(d) of AEDPA is applicable to deportation cases pending at its enactment (*id.* at 28a-38a). The

court also concluded (*id.* at 39a-46a), however, that the application of AEDPA § 440(d) to Avelar-Cruz's case violates equal protection because in its view the distinction between deportable and excludable criminal aliens, with respect to the availability of Section 1182(c) relief, lacks a rational basis. The government appealed to the Seventh Circuit.

4. The court of appeals consolidated the appeals in *LaGuerre* and *Avelar-Cruz* and on December 22, 1998, issued a decision directing the district court to dismiss the habeas corpus petitions in both cases. Pet. App. 1a-13a. The court concluded that Sections 401(e) and 440(a) of AEDPA divested the district courts of authority to review the merits of final deportation orders by habeas corpus, and that the bar to judicial review enacted by Congress does not create any constitutional difficulty under the Suspension of Habeas Corpus Clause. See *id.* at 4a-10a.

In reviewing the statutory history of judicial review of deportation orders, the court observed that, although before 1961 such orders were reviewable by habeas corpus in the district courts, in 1961 "Congress made review of such orders by the courts of appeals, without preliminary recourse to the district courts, the exclusive method of judicial review." Pet. App. 3a. Although Congress in 1961 expressly preserved "[t]he right of habeas corpus" in a provision of the INA itself, see *ibid.* (discussing 8 U.S.C. 1105a(a)(10) (1994)), that provision "was intended to be limited to situations in which the alien was unable to obtain judicial review under the new statutory procedure" enacted in 1961, *id.* at 4a. Further, that provision in the INA "preserving a limited right to apply for habeas corpus" was repealed by Section 401(e) of AEDPA. *Ibid.*

The court acknowledged that dicta in its previous decisions construing AEDPA § 440(a)—which amended 8 U.S.C. 1105a(a)(10) to preclude review by any court of deportation orders entered against aliens convicted of drug offenses and

aggravated felonies—had suggested that some review by habeas corpus might remain available in the district courts, had noted that Congress had not expressly amended 28 U.S.C. 2241, and had raised potential constitutional concerns about a suspension of habeas corpus. Pet. App. 4a. The court concluded in this case, however, that no constitutional concerns would be raised by precluding district court review by habeas corpus of petitioners' claims. The court observed that there was no question in this case of "the jurisdiction of the immigration authorities over [petitioners]," for "[t]here can be no doubt that [petitioners] are detained pursuant to valid orders issued by the responsible authorities." *Id.* at 5a. Further, "[t]he issue they wish to press—the issue of whether they are entitled to ask for discretionary relief from these orders—does not raise doubts about the jurisdiction of the [INA] over them." *Id.* at 5a-6a. And, the court stressed (*id.* at 6a), "we cannot think of any theory under which Congress would have wanted [AEDPA §] 440(a) to limit only review in the courts of appeals and leave intact whatever powers the old [8 U.S.C. 1105a(a)(10) (1994)]—which, remember, [AEDPA §] 440(a) repealed—had conferred on district courts." If petitioners were correct that the district courts retained authority to review deportation orders by habeas corpus even after enactment of AEDPA, then "Congress accomplished nothing toward its aim of curtailing judicial review" in cases involving aliens convicted of drug offenses and aggravated felonies. *Id.* at 8a. Therefore, the court held (*ibid.*), "for the class of aliens encompassed by [AEDPA] [S]ection 440(a), judicial review by means of habeas corpus did not survive enactment of that [S]ection."

The court also noted, however, that "[i]t does not follow that judicial review of the class of deportation orders illustrated by the orders in these two cases has been totally extinguished," for the government acknowledged that, even after enactment of AEDPA § 440(a), the courts of appeals

retained authority to review substantial constitutional challenges to the INA presented by aliens convicted of the specified criminal offenses. Pet. App. 8a-9a. The court also suggested (*id.* at 10a) that, "if for reasons beyond the alien's control he could not have raised his substantial constitutional issue in [the court of appeals] by seeking review here directly under [AEDPA §] 440(a), he may be able to proceed in the district court directly under 28 U.S.C. § 2241," but "[t]his we need not decide; such cases will be very rare, and these two cases are not among them."

Although the court of appeals thus concluded that it had no jurisdiction in this case, it also examined the merits of petitioners' challenges to their deportation orders, "lest they feel we've tripped them up on a technicality," Pet. App. 10a, and found them without substance, *id.* at 10a-13a. As for petitioners' contention that AEDPA § 440(d) should not be applied to their cases, the court found nothing in the text of the statute to indicate definitively whether Congress intended Section 440(d) to apply to cases pending at its enactment, noting that some provisions of AEDPA curtailing the rights of aliens were expressly prospective whereas others were expressly retroactive. *Id.* at 10a-11a. The court then considered issues of retroactivity more generally, and observed that changes in substantive law are usually not applied retroactively, whereas statutes "that change merely procedures" may be applied to pending cases, because "people are much more likely to rely on substantive than procedural law." *Id.* at 11a. But, the court noted, "[i]t would border on the absurd to argue that [petitioners] might have decided not to commit drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation." *Id.* at 11a-12a.

The court also found no merit to Avelar-Cruz's claim that Section 1182(c), as amended by AEDPA § 440(d), violates equal protection because it applies only to aliens placed in deportation proceedings in the United States and not to aliens returning from abroad. That distinction is rational, the court noted, because "it creates an incentive for deportable aliens to leave the country—which is after all the goal of deportation—without their having to be ordered to leave at the government's expense. To induce their voluntary departure, a little carrot is dangled before them, consisting of the opportunity to seek a waiver should they seek to return to the country." Pet. App. 12a.

ARGUMENT

Petitioners renew their contentions that (1) the district courts have authority under the general federal habeas corpus statute, 28 U.S.C. 2241, to review their challenges to the merits of final orders of deportation entered against them, notwithstanding Sections 401(e) and 440(d) of AEDPA, which repealed the INA's provision of habeas corpus authority to the district courts and expressly precluded judicial review of challenges to deportation orders raised by aliens convicted of certain criminal offenses; (2) Section 440(d) of AEDPA, enacted by Congress to preclude discretionary relief from deportation under 8 U.S.C. 1182(c) (1994) for such aliens, does not apply in the cases of aliens against whom deportation proceedings had been commenced before AEDPA was enacted; and (3) if Section 440(d) does apply in such cases, then it violates equal protection because it applies only to aliens placed in deportation proceedings in the U.S. and does not apply to aliens returning to the United States from a trip abroad.

As petitioners concede (Pet. 17 n.13), the court of appeals' comments on the merits are dicta, because the court concluded that it did not have jurisdiction in the case. For that

reason alone, the merits issues do not warrant review. Moreover, petitioners' challenges are closely related to the issues that were presented in the government's certiorari petitions denied by this Court in *Reno* v. *Goncalves*, 119 S. Ct. 1140 (1999), and *Reno* v. *Navas*, 119 S. Ct. 1141 (1999). The Court's denial of certiorari in those cases may have reflected a perception that, in light of the Court's decision in *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (*AADC*), those petitions presented only issues that were relevant to "transitional cases," *i.e.*, to deportation proceedings commenced before April 1, 1997, the general effective date of IIRIRA, which comprehensively revised the INA and established an entirely new statutory framework for removal of aliens from the United States and judicial review of removal orders.[5] Now, almost a year later,

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[5] In *AADC*, the Court construed 8 U.S.C. 1252(g) (Supp. IV 1998), added to the INA by IIRIRA, which precludes the district courts from entertaining "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." Although the Court held in *AADC* that Section 1252(g) did prevent the district court from taking jurisdiction in that case, it rejected the construction of Section 1252(g) principally put forth by the government, which would have eliminated the district court's authority to entertain challenges to the merits of final deportation orders. See 525 U.S. at 482-484. Before *AADC*, the government had relied on Section 1252(g) in cases like the present one to argue that the district courts had no habeas corpus authority to review the challenges presented by the aliens, and the government raised Section 1252(g) in its certiorari petitions in *Goncalves* and *Navas*. The proper construction of Section 1252(g) presented an issue of ongoing significance, because Section 1252(g) is part of the INA as comprehensively revised by IIRIRA. In light of *AADC*, the government no longer relies on Section 1252(g) in this case, but rather relies on Sections 401(e) and 440(a) of AEDPA, as well as the general structure of the INA before enactment of AEDPA and IIRIRA, to contend that the district courts lack such authority. Furthermore, in the decision below, the court of appeals relied on AEDPA §§ 401(e) and 440(a), and did not rely on

the same issues again do not warrant review, because they do not apply to removal proceedings commenced after April 1, 1997, and therefore are not of continuing importance, and because most of the courts of appeals have now resolved the issues presented and the volume of litigation on those issues has therefore subsided.

Petitioners also argue that, even if this Court does not grant plenary review, it should vacate the judgment of the court of appeals and remand the case for further consideration (on jurisdiction) in light of asserted conflicts in the Seventh Circuit's own cases and (on the merits) in light of this Court's intervening decision in *Martin* v. *Hadix*, 119 S. Ct. 1998 (1999), concerning retroactivity in another context. Such a remand would serve no purpose, however, for nothing in either the court of appeals' or this Court's intervening case law suggests that petitioners would be granted relief on remand. The petition therefore should be denied.

1. a. Petitioners first argue (Pet. 18-22) that the Court should vacate the judgment of the court of appeals and remand this case because the court of appeals' jurisdictional ruling in this case supposedly conflicts with subsequent circuit case law. Petitioners point out (Pet. 19-20) that, before the court of appeals' decision in this case, the Seventh Circuit had held that Section 440(a) of AEDPA absolutely precluded the court of appeals from entertaining any challenge to a deportation order brought by a criminal alien covered by Section 440(a), but had suggested that the district courts might have authority to exercise habeas corpus jurisdiction over constitutional challenges to deportation orders, notwithstanding Sections 401(e) and 440(a) of

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Section 1252(g), to reach its jurisdictional ruling. Sections 401(e) and 440(a) of AEDPA, however, did not survive the amendments to the INA made by IIRIRA, and therefore have no ongoing significance beyond the transitional cases commenced before IIRIRA's effective date.

AEDPA. See *Chow* v. *INS*, 113 F.3d 659, 668-670 (7th Cir. 1997) (*Chow I*); *Turkhan* v. *INS*, 123 F.3d 487, 490 (7th Cir. 1997) (*Turkhan I*). Petitioners also observe (Pet. 20-21) that, after the court of appeals' decision in this case, that court allowed the district courts to exercise habeas corpus jurisdiction over challenges to deportation orders in *Chow* and *Turkhan*, where the aliens, following dismissal of their petitions for review, sought habeas relief in reliance on the Seventh Circuit's earlier statements that any relief available on constitutional claims must be by some route other than a petition for review, such as habeas corpus. See *Chow* v. *Reno*, 193 F.3d 892, 893-894 (7th Cir. 1999) (*Chow II*); *Turkhan* v. *Perryman*, 188 F.3d 814, 823-824 (7th Cir. 1999) (*Turkhan II*). Petitioners argue that the Seventh Circuit should have followed the same course in this case, to avoid unfairness to them for having relied on that court's earlier jurisdictional decisions.

Petitioners' assertion of an intracircuit conflict between the decision in this case and subsequent decisions of the Seventh Circuit ignores distinctions among the cases[6] and in any

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[6] In both *Turkhan II* and *Chow II*, the alien previously *had* filed a petition for review, which the Seventh Circuit then dismissed for lack of jurisdiction. See *Turkhan I*, 123 F.3d at 490; *Chow I*, 113 F.3d at 668-670. The Seventh Circuit therefore concluded in *Turkhan II* and *Chow II* that those cases fell within the exception to the jurisdictional bar to habeas review recognized by the panel in this case (see Pet. App. 10a) for cases in which, "for reasons beyond the alien's control," he was unable to raise a substantial constitutional issue directly in the court of appeals. See *Turkhan II*, 188 F.3d at 824; *Chow II*, 193 F.3d at 893-894. Here, by contrast, petitioners did not previously file a petition for review in that court (albeit apparently due to the decisions in *Chow I* and *Turkhan I*), and the court of appeals therefore did not dismiss any such petition and thus itself prevent review "for reasons beyond the alien's control." Compare *Musto* v. *Perryman*, 193 F.3d 888, 891 (7th Cir. 1999) (ordering dismissal of habeas petition filed by similarly situated alien). Moreover, although the Seventh Circuit in *Chow I* and *Turkhan I* had left open the

event does not warrant review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957). Moreover, petitioners overlook that the court of appeals did examine the merits of their claims precisely to avoid any seeming unfairness that might have arisen from the fact that the court had previously stated that no claims of any kind could be raised in the court of appeals by a criminal alien covered by Section 440(a) of AEDPA. See Pet. App. 10a ("But we shall add, lest they feel that we've tripped them up on a technicality, that they would not have prevailed even if they hadn't dropped the jurisdictional ball.").

As petitioners concede (Pet. 17 n.13), the court's comments on their claims were dicta, given the court's jurisdictional holding. But after the court of appeals issued its decision in this case, it examined the very same claims again and squarely rejected them on the merits. In *Turkhan II*, which like this case involved a criminal alien who applied for Section 1182(c) relief before AEDPA was enacted, the court reaffirmed that "AEDPA § 440(d) applies retroactively to bar covered criminal aliens from seeking a discretionary waiver of deportation under" Section 1182(c) (except in one respect not relevant here), see 188 F.3d at 827, and concluded that the statute's application to pending cases does

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prospect of habeas relief on substantial *constitutional* claims, see *Chow I*, 113 F.3d at 668-670; *Turkhan I*, 123 F.3d at 490, petitioners seek to raise a non-constitutional claim concerning the temporal reach of Section 440(d) of AEDPA as well as a constitutional equal protection claim.

In *Singh* v. *Reno*, 182 F.3d 504 (7th Cir. 1999), on which petitioners also rely (Pet. 20-22), the court of appeals in fact ordered dismissal of the habeas corpus petition, while directly ordering that prior administrative proceedings be vacated in the "unusual circumstances" of the particular procedural due process claim in that case. See 182 F.3d at 511. Petitioners raise no such claim here.

not violate due process, *id.* at 827-828.[7] The court also rejected the same equal-protection challenge as that raised in this case, relying on its decision in this case. See *id.* at 828-829. The court again rejected the same equal-protection challenge in *Chow II*, 193 F.3d at 894. Accordingly, a remand would serve no purpose in this case, because the court of appeals has definitively rejected the substance of petitioners' contentions. See, *e.g.*, *Musto* v. *Perryman*, 193 F.3d 888, 891 (7th Cir. 1999) (denying relief to similarly situated alien).

b. Petitioners argue in the alternative (Pet. 22-25) that the Court should grant plenary review on the question whether the district courts retain authority under 28 U.S.C. 2241 to review the merits of final deportation orders. We acknowledge (as we pointed out in our filings in this Court in *Goncalves* and *Navas*) that the Seventh Circuit's jurisdictional ruling conflicts with decisions of other circuits, which have held that AEDPA did not divest the district courts of that authority under Section 2241, at least where the habeas corpus petition is filed by an alien who is precluded by AEDPA § 440(a) from raising any challenge to his deportation order by petition for review in the court of appeals.[8]

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[7] Although the court in *Turkhan II* stated that Section 440(d) applies "retroactively" to pending deportation proceedings, the better analysis is that the application of Section 440(d) to such proceedings does not constitute retroaction at all, since it controls the Attorney General's authority to grant relief from deportation in the future, *i.e.*, after AEDPA's enactment. See p. 26, n.13, *infra*. In any event, the court in *Turkhan II* arrived at the same conclusion as that arrived at by the court below in this case, namely, that Section 440(d) may be applied to deportation proceedings pending at its enactment without running afoul of either the presumption against retroactive application of federal civil statutes or constitutional concerns, and there is no reason to believe the court of appeals would arrive at a different conclusion should this case be remanded.

[8] See Gov't Reply Br., *Navas*, at 2-3; Gov't Reply Br., *Goncalves*, at 1-3; see also *Goncalves* v. *Reno*, 144 F.3d 110, 116-126 (1st Cir. 1998), cert.

The jurisdictional issue presented in this case has only limited future significance, however, because the INA was comprehensively revised by IIRIRA, which prospectively eliminated Section 440(a) of AEDPA (on which the court of appeals in this case relied) and replaced the INA's judicial review provisions with an entirely new framework in 8 U.S.C. 1252 (Supp. IV 1998). Moreover, among the provisions added by IIRIRA is a new 8 U.S.C. 1252(b)(9) (Supp. IV 1998), which this Court described in *AADC* as an "unmistakable 'zipper' clause" (525 U.S. at 483) channeling all judicial review of removal orders into the courts of appeals.

Aliens may argue, in cases arising under the new removal provisions of IIRIRA, that the district courts have authority under Section 2241 to review challenges to removal orders filed by criminal aliens precluded from seeking review in the courts of appeals by IIRIRA, see 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998). See, *e.g.*, *Richardson* v. *Reno*, 180 F.3d 1311 (11th Cir. 1999), petition for cert. pending, No. 99-887. If that argument is made, then the courts should consider, not just the express repeal in AEDPA § 401(e) of the district court's former habeas corpus authority under 8 U.S.C. 1105a(a)(10) (1994) (repealed 1996), but also the structure of Section 1252 as a whole, the proper reach of Section

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denied, 119 S. Ct. 1140 (1999); *Henderson* v. *INS*, 157 F.3d 106, 118-122 (2d Cir. 1998), cert. denied sub nom. *Reno* v. *Navas*, 119 S. Ct. 1141 (1999); *Sandoval* v. *Reno*, 166 F.3d 225, 229-238 (3d Cir. 1999); *Bowrin* v. *INS*, 194 F.3d 483, 486-490 (4th Cir. 1999); *Requena-Rodriguez* v. *Pasquarell*, 190 F.3d 299, 304-306 (5th Cir. 1999); *Pak* v. *Reno*, 196 F.3d 666, 671- 674 (6th Cir. 1999); *Shah* v. *Reno*, 184 F.3d 719, 722-724 (8th Cir. 1999); *Magana-Pizano* v. *INS*, Nos. 97-15678 and 97-70384, 1999 WL 1249703, at *3-*5 (9th Cir. Dec. 27, 1999); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1142-1147 (10th Cir. 1999); *Mayers* v. *INS*, 175 F.3d 1289, 1296-1301 (11th Cir. 1999) (all holding that Congress did not, in AEDPA, divest district courts of authority under 28 U.S.C. 2241 to address question on retroactive application of AEDPA § 440(d)).

1252(a)(2)(C), and the relevance of Section 1252(b)(9), all of which were added by IIRIRA, and are applicable only to removal proceedings commenced after April 1, 1997, but not to this case. Should the courts of appeals reach conflicting decisions on the continued availability of habeas corpus review of removal orders after IIRIRA, this Court will have the opportunity to consider issues about the continuing availability of habeas corpus under Section 2241 in the context of a proceeding under IIRIRA, which governs all removal proceedings commenced after April 1, 1997.

c. The jurisdictional ruling of the court of appeals is correct. The court of appeals properly held that Congress precluded the district courts from reviewing the merits of deportation orders by habeas corpus. The court correctly pointed out that, although before 1961 Congress authorized the district courts to entertain challenges to deportation orders by habeas corpus, "[i]n 1961 Congress made review of such orders by the courts of appeals, without preliminary recourse to the district courts, the exclusive method of judicial review." Pet. App. 3a. The Seventh Circuit reasoned that, although Congress in 1961 preserved a limited authority for the district courts to grant habeas corpus, see 8 U.S.C. 1105a(a)(10) (1994) (repealed 1996), that provision "was intended to be limited to situations in which the alien was unable to obtain judicial review under the new statutory procedure." Pet. App. 4a.

In AEDPA § 401(e)—entitled "Elimination of Custody Review By Habeas Corpus"—Congress repealed 8 U.S.C. 1105a(a)(10) (1994), which had previously preserved some of the district court's habeas corpus authority. Section 440(a) of AEDPA also provided that final deportation orders entered against certain criminal aliens "shall not be subject to review by any court." Section 401(e) thus eliminated whatever authority to issue habeas corpus the district courts had previously retained after 1961 and therefore shifted all

review of deportation orders to the courts of appeals; Section 440(a) withdrew the availability of review in the courts of appeals at the behest of criminal aliens, except insofar as the withdrawal of such review would create serious constitutional questions.[9]

As the court of appeals observed, petitioners' jurisdictional theory—which would open the district courts to review under habeas corpus only for criminal aliens, and not for all other aliens, who must proceed through the INA's ordinary exclusive review procedure in the courts of appeals—would make judicial review for criminal aliens *more* protracted than for noncriminal aliens, a result demonstrably at odds with Congress's intent to streamline the process of removing criminal aliens from the country. See Pet. App. 8a

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[9] For that reason, we have argued that AEDPA § 440(a) should not be read to preclude the courts of appeals from entertaining constitutional challenges to the INA itself made by criminal aliens. Although Section 440(a) states broadly that "[a]ny" final order of deportation entered against certain criminal aliens "shall not be subject to review by any court," the statute does not express clearly and convincingly an intent by Congress to preclude judicial review of constitutional claims. This Court has stated on several occasions that such preclusion of review of constitutional issues would raise serious constitutional questions. See *Webster* v. *Doe*, 486 U.S. 592, 603 (1988). We therefore read AEDPA § 440(a) to permit the courts of appeals to entertain petitioners' equal-protection challenge to AEDPA § 440(d). As we explain below (pp. 28-29, *infra*), however, that challenge fails on the merits in any event.

We have also argued that the courts of appeals retain jurisdiction to review threshold issues of alienage and deportability to determine whether the preclusion of review in AEDPA § 440(a) in fact applies to a petition for review at hand. The courts of appeals have for the most part agreed. See *Xiong* v. *INS*, 173 F.3d 601 (7th Cir. 1999) (reversing BIA deportability finding for criminal alien); *Hall* v. *INS*, 167 F.3d 852 (4th Cir. 1999) (reviewing deportability issue to determine court's jurisdiction in case of criminal alien); *Okoro* v. *INS*, 125 F.3d 920, 925 (5th Cir. 1997); *Coronado-Durazo* v. *INS*, 123 F.3d 1322 (9th Cir. 1997); but see *Berehe* v. *INS*, 114 F.3d 159, 161 (10th Cir. 1997). That issue is not presented here.

(noting that, if petitioners' submission were accepted, then "Congress accomplished nothing toward its aim of curtailing judicial review [for criminal aliens], * * * and [m]aybe less than nothing"); *Henderson* v. *INS*, 157 F.3d 106, 119 n.9 (2d Cir. 1998) (acknowledging that it would be more consistent with congressional intent to streamline review for criminal aliens' claims to proceed in the court of appeals than district court), cert. denied *sub nom. Reno* v. *Navas*, 119 S. Ct. 1141 (1999).

Congress's action in AEDPA to curtail judicial review of deportation orders for criminal aliens raises no substantial constitutional questions. First, whatever review of deportation orders is required by the Suspension of Habeas Corpus Clause is satisfied by the opportunity for direct review in the courts of appeals as prescribed in the INA. There can be "no question of Congress' power to prescribe a habeas corpus substitute," Pet. App. 10a; see *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977), and Congress has provided such a substitute by placing review directly in the courts of appeals. As explained above (p. 21, n.9, *supra*), Section 440(a) of AEDPA does not preclude the courts of appeals from reviewing constitutional challenges to the INA itself by criminal aliens. Second, Congress is not required by the Suspension of Habeas Corpus Clause to provide for judicial review of purely statutory questions arising out of the application of the immigration laws, at least when such statutory questions concern solely the alien's eligibility for discretionary relief from deportation, and the alien's deportability is without dispute. This Court has described the grant of discretionary immigration relief as an "act of grace" akin to "a judge's power to suspend the execution of a sentence or the President's [power] to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 29 (1996). As the court of appeals observed, it is doubtful the Suspension of Habeas Corpus Clause "requires preserving habeas corpus as a vehicle for

challenging final orders of deportation in cases in which the jurisdiction of the immigration authorities over the alien is not in question." Pet. App. 5a.[10] Third, Congress's preclusion of review of petitioners' nonconstitutional claims raises no serious questions under Article III, for the federal courts have jurisdiction to review statutory questions only to the extent that Congress assigns it to them, see *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984), and "[t]he power to expel aliens, being essentially a power of the political branches of the government, * * * may be exercised entirely through executive officers, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit," *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952) (internal quotation marks omitted); see *ibid.* ("No judicial review [of deportation orders] is guaranteed by the Constitution.").[11]

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[10] The court of appeals also suggested that petitioners' challenges to the Attorney General's construction of AEDPA § 440(d) in *Soriano* might be reviewable in the courts of appeals by review petition, notwithstanding AEDPA § 440(a). Pet. App. 12a. We submit that Section 440(a) bars review of that claim in any court, and that such preclusion does not present constitutional concerns. If that claim is reviewable by the courts, however, it would be far more consistent with Congress's overall intent to streamline judicial review of criminal aliens' deportation orders to construe AEDPA § 440(a) to permit review of that claim in the courts of appeals, rather than to find that review remains available in the district courts under 28 U.S.C. 2241. Cf. *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973) ("It is well established that our task in interpreting separate provisions of a single Act is to give the Act the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose.") (internal quotation marks omitted).

[11] Petitioners observe (Pet. 25) that this Court has considered, in habeas corpus proceedings, aliens' claims that they were eligible to be considered for discretionary relief from deportation. In neither *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), nor *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957), however, did the Court's opinion address the question of habeas jurisdiction over

2. With regard to the temporal scope of Section 440(d) of AEDPA, petitioners urge the Court to remand the case to the court of appeals in light of *Martin* v. *Hadix*, 119 S. Ct. 1998 (1999), or to grant plenary review. Neither course of action is warranted.

a. First, a remand to the court of appeals (or plenary review in this Court) would not be appropriate because, as we have explained, the court of appeals correctly ruled that it lacked jurisdiction over petitioners' claims. The court of appeals therefore has no power to entertain petitioners' challenges to their deportation orders and could not reexamine the merits of those claims based on *Hadix*. Because of that jurisdictional barrier (and because the court of appeals' comments on the merits of petitioners' claims are therefore dicta), this case also is not an appropriate vehicle for this Court to give plenary consideration to the merits of petitioners' claims.

Second, petitioners' challenge to the Attorney General's construction in *Soriano* of the amendment to Section 1182(c) made by AEDPA § 440(d) is of limited prospective significance. Congress has repealed Section 1182(c) for removal proceedings commenced after April 1, 1997, and replaced it with a new form of discretionary relief, known as cancellation of removal. See pp. 4-5, *supra*. Thus, while there is a conflict in the circuits on the temporal scope of AEDPA § 440(d),[12] the question presented here has now been settled

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deportation orders, and it did not suggest that such jurisdiction was required by the Constitution itself. This Court has never considered itself bound by *sub silentio* assumptions of jurisdiction in the manner that petitioners suggest. See *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 97 (1994).

[12] Compare the decision below with *Goncalves*, 144 F.3d at 126-133, *Wallace* v. *Reno*, 194 F.3d 279, 285-288 (1st Cir. 1999), *Henderson*, 157 F.3d at 129-130, *Sandoval*, 166 F.3d at 241, *Pak*, 196 F.3d at 675-676, *Shah*, 184 F.3d at 724, *Magana-Pizano*, 1999 WL 1249703, at *6-*8, and *Mayers*,

in most circuits and the issue is inherently restricted to "transitional cases." The Court denied review of the same issue last Term in *Goncalves* and *Navas*, and there is no basis in this case for a different result. The Attorney General also presently has under consideration a number of proposals for an administrative response to the court of appeals decisions that have rejected her construction of AEDPA § 440(d) in *Soriano*.

Third, the court of appeals' decision raises no broad issues of retroactivity warranting this Court's review. The court of appeals applied the two-part test articulated by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), for determining whether a new statute applies to pre-enactment conduct. The court first considered whether Congress had specifically addressed the question of the temporal application of AEDPA § 440(d) and determined that there is no clear indication of congressional intent as to its temporal scope. See Pet. App. 10a-11a (noting that several provisions of Title IV of AEDPA were expressly made prospective, and two were expressly made applicable to pending cases, but Congress expressly indicated neither as to Section 440(d)). The court next examined whether application of Section 440(d) to petitioners' cases would contravene the traditional presumption against retroactivity, and concluded that it would not, because, the court observed, while statutes that impose new primary duties are generally not applied to pending cases, new laws that change procedures usually are so applied. See *id.* at 12a. The court further noted that such procedural changes are usually applied "retroactively" be-

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175 F.3d at 1301-1304. Compare also *DeSousa* v. *Reno*, 190 F.3d 175, 185-187 (3d Cir. 1999) (holding that AEDPA § 440(d) does apply to aliens convicted before AEDPA but placed in deportation proceedings after enactment), *Requena- Rodriguez*, 190 F.3d at 307-308 (same), and *Jurado-Gutierrez*, 190 F.3d at 1152-1155 (same), with *Magana-Pizano*, 1999 WL 1249703, at *8-*9 (discussed at p. 27, n.14, *infra*).

cause they do not disturb "reasonable expectations," which underlie the presumption against retroactivity. *Ibid.* In this case, the court stated, it would "border on the absurd" to suggest that AEDPA § 440(d) disturbed any reasonable expectation in the availability of relief from deportation that petitioners might have had when they decided to commit their crimes or resist conviction at their criminal trials. *Id.* at 11a-12a; accord *Requena-Rodriguez* v. *Pasquarell*, 190 F.3d 299, 308 (5th Cir. 1999); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1150-1151 (10th Cir. 1999).[13]

b. This Court's decision in *Hadix* provides no basis for a remand. *Hadix* involved the temporal reach of a new provision limiting attorney's fees for prisoner lawsuits, Section 803 of the Prison Litigation Reform Act of 1995 (PLRA), 110 Stat. 1321-66, 42 U.S.C. 1997e. Stressing that retroactivity implicates issues of "fair notice, reasonable reliance, and settled expectations," 119 S. Ct. at 2006, the Court concluded

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[13] The court of appeals did not elaborate on its point that the application of AEDPA § 440(d) to pending cases may be understood as a "procedural" change. As the Attorney General observed in her decision in *Soriano*, however, the application of AEDPA § 440(d) to pending deportation proceedings is not retroactive at all because Section 440(d) governs the availability of *prospective* relief from deportation, which itself is intended to remedy a continuing violation of federal immigration law (the alien's unlawful presence in the United States). See p. 6, *supra*; see also *Landgraf*, 511 U.S. at 273 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."). This Court confirmed that point in *AADC*, where it emphasized that "in all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law." 525 U.S. at 491. Deportation and the Attorney General's authority to grant relief from deportation are therefore matters inherently prospective in nature. See *DeSousa*, 190 F.3d at 187 (recognizing that legislative changes affecting the Attorney General's discretionary authority to grant relief from deportation in the future have only prospective impact); *Samaniego-Meraz* v. *INS*, 53 F.3d 254, 256 (9th Cir. 1995); *De Osorio* v. *INS*, 10 F.3d 1034, 1042 (4th Cir. 1993).

that application of Section 803 to govern work performed in pending cases after the passage of the new law creates "no retroactivity problem" because that application controlled only post-enactment conduct by attorneys, *id.* at 2007. Similarly, as the court of appeals noted in this case (p. 12, *supra*), application of Section 440(d) to pending proceedings does not create any problem involving fair notice, reasonable reliance, or settled expectations on the part of aliens like petitioners who committed their crimes before AEDPA was enacted. The court of appeals' decision is therefore consistent with the principles governing retroactivity articulated by this Court in *Hadix*.[14]

3. Petitioners' equal-protection claim also does not warrant further review. As is true of the issues of habeas corpus jurisdiction and the temporal scope of AEDPA § 440(d) discussed above, the equal-protection issue is of diminishing importance because Congress has repealed Section 1182(c), and so the claim by its nature applies only to transitional cases. Second, there is no conflict among the circuits on the

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[14] In its recent decision in *Magana-Pizano*, the Ninth Circuit agreed with the government that AEDPA § 440(d) does apply generally to aliens placed in deportation proceedings after AEDPA was enacted, if the alien was convicted before its enactment date. See 1999 WL 1249703, at *9. The court also expressed concern, however, about aliens who might have pled guilty or nolo contendere prior to the enactment of AEDPA, based on representations about the availability of Section 1182(c) relief. The court therefore left open the possibility of habeas relief upon a specific factual showing by an alien that he had entered a plea of guilty or nolo contendere in reliance on the availability of relief under Section 1182(c). The Ninth Circuit's belief that aliens (and only those aliens) who make such a factual showing could be exempt from the reach of AEDPA § 440(d) is incorrect. Retroactivity analysis examines the applicability of a law to the entire class of persons situated at particular point in time, not on the potentially varying specific reliance interests of different individuals within such a class. The Solicitor General has not yet decided whether to seek rehearing en banc in *Magana-Pizano*.

issue. Every other circuit that has addressed the equal-protection challenge to Section 440(d) has also rejected it. See *Almon* v. *Reno*, 192 F.3d 28, 29-32 (1st Cir. 1999); *DeSousa* v. *Reno*, 190 F.3d 175, 184-185 (3d Cir. 1999); *Requena-Rodriguez*, 190 F.3d at 308-310; *Jurado-Gutierrez*, 190 F.3d at 1152-1153. Further, even if the equal-protection claim had merit, the appropriate remedy, given Congress's overall intent in AEDPA to restrict relief from deportation for criminal aliens, would be to extend Congress's bar against discretionary relief to aliens in exclusion proceedings, rather than to strike it for aliens in deportation proceedings. See *DeSousa*, 190 F.3d at 185 n.8 (noting that "the history of Congress' amendments to [Section 1182(c)] shows that, throughout the 1990s, it had been tightening the controls over granting such waivers"); cf. *United States* v. *Estrada-Torres*, 179 F.3d 776, 779 (9th Cir. 1999) (reading language of AEDPA § 440(d) to eliminate discretionary relief for both excludable and deportable aliens).

Third, the court of appeals' rejection of petitioners' equal-protection claim is correct. Congress had a rational basis for precluding certain criminal aliens placed in deportation proceedings in the United States from obtaining Section 1182(c) relief, even while allowing criminal aliens seeking to return to the United States from a trip abroad to remain eligible for such relief. See *Fiallo* v. *Bell*, 430 U.S. 787, 794 (1977) (in light of Congress's plenary power over immigration, statutory classification must be upheld if it is based upon any "facially legitimate and bona fide reason"). The court of appeals observed that Congress's distinction encourages deportable aliens to leave the country—"which is after all the goal of deportation"—by providing them with an opportu-

nity to apply for Section 1182(c) relief in exclusion proceedings if they attempt to return. Pet. App. 12a.[15]

Petitioners' reliance on *Francis* v. *INS*, 532 F.2d 268 (2d Cir. 1976), is misplaced. *Francis* addressed a distinction that the BIA had drawn (for purposes of eligibility for Section 1182(c) relief) between two classes of aliens placed in deportation proceedings in the United States, based solely on whether the alien had previously taken a temporary trip abroad. See *Requena-Rodriguez*, 190 F.3d at 308-309 (explaining *Francis*); p.3, n.1, *supra*. Petitioners' claim challenges an entirely different distinction, between aliens placed in deportation proceedings in the United States and aliens placed in exclusion proceedings at the border or a port of entry. That traditional distinction has been fundamental to the INA. See *Landon* v. *Plasencia*, 459 U.S. 21, 25-28 (1983). Given the quite different purposes of the two kinds of proceedings and the different ways in which they operate, Congress is entitled to make different judgments about the kinds of claims for discretionary relief that may be considered in the proceedings.

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[15] Furthermore, Congress's decision to address criminal aliens in deportation proceedings and not exclusion proceedings is rational for another reason—aliens in deportation proceedings pose a much more serious problem simply because they are much more numerous. See H.R. Rep. No. 469(I), 104th Cong., 2d Sess. 384-385 (1996) (reporting that INS in 1995 removed a total of approximately 32,000 criminal aliens—29,255 arising from deportation cases and only 2,738 from exclusion cases); *Almon*, 192 F.3d at 31 (noting same). While excludable criminal aliens may also constitute an immigration problem, "a legislature traditionally has been allowed to take reform one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *McDonald* v. *Board of Election Comm'rs*, 394 U.S. 802, 809 (1969) (internal quotation marks omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

JOSE MARTIN AVELAR-CRUZ and GARY LAGUERRE,

Petitioners,

v.

JANET RENO, Attorney General, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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REPLY BRIEF FOR THE PETITIONERS

Since the filing of the Petition for Writ of Certiorari, four more circuits have addressed the issues in this case. The opinion of the Seventh Circuit now squarely conflicts with the holdings of ten other courts of appeals on the jurisdiction of the federal courts and with seven other courts of appeals on whether a new mandatory deportation provision affecting thousands of longtime lawful permanent residents of the United States applies retroactively. The First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits have all expressly held that the district courts retain habeas corpus jurisdiction under 28 U.S.C. 2241 to review the identical constitutional and statutory claims presented by petitioners Avelar-Cruz and LaGuerre. The First, Second, Third, Sixth, Eighth, Ninth and Eleventh Circuits have also rejected the Attorney General's ruling in *Matter of Soriano*, Int. Dec. No. 3289 (AG Feb. 21, 1997), that AEDPA 440(d) deprives legal resident immigrants who were in deportation proceedings when AEDPA was enacted of their eligibility for deportation relief under 8 U.S.C. 1182(c) (1994) (repealed 1996).[1] On both issues, only the Seventh Circuit has ruled to the contrary.

The judgment of the court of appeals should be vacated and remanded in light of this Court's intervening retroactivity decision in *Martin v. Hadix*, 119 S. Ct. 1998 (1999), as well

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[1] *See Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 119 S. Ct. 1140 (1999); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas*, 119 S. Ct. 1141 (1999); *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999); *Bowrin v. INS*, 194 F.3d 483 (4th Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299 (5th Cir. 1999); *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999); *Magana-Pizano v. INS*, No. 97-15678, 1999 WL 1249703 (9th Cir. Dec. 27, 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999). Three circuits – the Fourth, Fifth and Tenth – upheld habeas corpus jurisdiction but did not address the application of AEDPA 440(d) to immigrants *in deportation proceedings* when AEDPA was enacted.

as the Seventh Circuit's own subsequent jurisdictional decisions contradicting the ruling in this case. Alternatively, plenary review should be granted to resolve the lopsided circuit split on whether AEDPA 401(e) and 440(a) repealed habeas corpus jurisdiction under 28 U.S.C. 2241 and whether AEDPA 440(d) applies to pending immigration proceedings.

I. The Opinion Should be Vacated and Remanded in Light of *Martin v. Hadix* and in Light of the Seventh Circuit's Subsequent Jurisdictional Rulings.

The judgment of the court of appeals should be vacated and remanded for reconsideration based on two separate and independent grounds. First, the court of appeals' conclusion on the merits that AEDPA 440(d) applies retroactively to immigration proceedings already pending when AEDPA was enacted is inconsistent with the retroactivity analysis in this Court's recent decision in *Martin v. Hadix*. Second, the court of appeals' jurisdictional ruling that litigants who filed habeas corpus petitions under the Seventh Circuit's prior precedents are left with no avenue for judicial review is inconsistent with the Seventh Circuit's own subsequent decisions. Both grounds warrant a remand, but either alone is sufficient.

1. Merits.

The government opposes remand of the merits based on its contentions that *Hadix* supports the court of appeals' retroactivity analysis, Br. in Opp. at 15; that a remand in light of *Hadix* would "serve no purpose" since the court of appeals held that it lacked jurisdiction and therefore cannot re-examine the merits, Br. in Opp. at 15, 24; and that subsequent Seventh Circuit cases have reiterated that AEDPA 440(d) applies retroactively; Br. in Opp. at 17-18.

a. *Hadix* supports petitioners' contention – and the holding of seven other circuits – that AEDPA 440(d) does not apply to immigration proceedings that were pending when

AEDPA was enacted. *Hadix* makes clear that whether a statute has "retroactive effect" is an intensely practical determination that "demands a common sense, functional judgment" of whether a law attaches new legal consequences to events completed before its enactment. *Hadix*, 119 S. Ct. at 2006. The Court resolved the retroactivity question in *Hadix* by carefully considering and specifically addressing the actual reliance of the plaintiffs on prior law and by determining whether the plaintiffs had taken any "irrevocable" action in reliance on the law before it was changed. Based on a review of actual practice and conduct, *Hadix* held that the new provision had an impermissible "retroactive effect" on acts (*i.e.*, attorney work hours) occurring before the change in law, but not on acts occurring afterwards. *Id.* at 2006-07.

The careful *Hadix* analysis is precisely what the court of appeals failed to undertake in this case. Instead of assessing how the criminal plea process actually functions for immigrants, the factors that they consider in that setting, and the irrevocable nature of their pre-AEDPA guilty pleas, the opinion simply dismissed petitioners' reliance claim as "absurd." Pet. App. at 11a. The court of appeals did not address the fact that structuring a guilty plea to preserve eligibility for Section 1182(c) relief was common among immigrants and defense attorneys before AEDPA because eligibility depended on the length of the sentence and the nature of the conviction.[2] *Compare Magana-Pizano*, 1999 WL 1249703, at *8 (detailing relevance of eligibility for Section 1182(c) to immigrant guilty pleas and noting mandatory procedures for advising immigrant defendants of immigration consequences of guilty plea).[3]

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[2] Before AEDPA, only convictions for "aggravated felonies" where the immigrant served five years or more in prison would render the individual ineligible.

[3] *See also Wallace v. Reno*, 24 F. Supp.2d 104, 110 (D. Mass. 1998), *aff'd*, 194 F.3d 279 (1st Cir. 1999); *Mojica v. Reno*, 970 F. Supp. 130, 177 (E.D.N.Y. 1997), *aff'd in part, dismissed in part sub nom. Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas*, 119

A guilty plea entered before the passage of AEDPA is plainly an "irrevocable" act occurring before the law changed to which AEDPA attaches new legal consequences, namely, ineligibility for discretionary relief. Under *Hadix*, that constitutes a retroactive effect. Indeed, two circuit courts cited *Hadix* in resolving the temporal scope of AEDPA 440(d) in favor of the majority view that AEDPA does *not* apply to immigrants who were in proceedings when AEDPA was enacted. *See Wallace v. Reno*, 194 F.3d 279, 286 (1st Cir. 1999) (citing *Hadix*); *Magana-Pizano*, 1999 WL 1249703, at *7 (same).

The government does not dispute that this Court's *Hadix* opinion constitutes an intervening decision on retroactivity that the court of appeals did not consider. Rather, the government argues that *Hadix* supports the court of appeals' retroactivity ruling. Br. in Opp. at 27. That conclusory assertion confirms the relevance of *Hadix* and indicates only that the government may press its current interpretation of 440(d) if the case is remanded. The existence of conflicting views on the effect of an intervening Supreme Court decision is precisely the purpose of a remand – to allow the court of appeals to address the parties' arguments in the first instance and to reconsider whether its ruling should be altered in light of a relevant pronouncement by this Court.

b. Contrary to the government's contention, the fact that the court of appeals dismissed petitioners' habeas corpus actions for lack of jurisdiction does not mean that a remand on the merits in light of *Hadix* would "serve no purpose." Br. in Opp. at 15. As reflected in our Petition for Certiorari, the court of appeals effectively rendered two jurisdictional rulings. The broader holding, that AEDPA repealed Section 2241 and placed exclusive review in the court of appeals, is the basis on which petitioners seek plenary review. *See* Point II,

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S. Ct. 1141 (1999); Pet. Br. at 27. *See generally* Kurzban, "The Immigration Act of 1990," *The Champion* (National Association of Criminal Defense Lawyers) (April 1991), at 7. An *amici curiae* brief by numerous criminal defender associations addressing this specific point was rejected by the court of appeals in this case.

infra; Pet. Br. at 22-23. The second and narrower jurisdictional ruling is the circuit court's decision to apply the repeal of Section 2241 to these petitioners (who simply followed the circuit's prior precedent) and to leave them with no avenue for judicial review. As explained below, that dismissal for lack of jurisdiction was inextricably linked to the court's resolution of the merits claim. Therefore, if the circuit court alters its view on the merits in light of *Hadix,* it would necessarily have to re-examine the jurisdictional ruling as well.

The government does not dispute that before the ruling in this case the Seventh Circuit had held that it no longer had jurisdiction over petitions for review filed by petitioners like these. Br. in Opp. at 15-16. Nor does the government dispute that the ruling in this case *requires* litigants to pursue the very procedure that the Seventh Circuit had previously *prohibited* (*i.e.*, a petition for review), or that the court of appeals then applied that new requirement to these petitioners, or that the petitioners could not comply because the 30-day filing deadline had passed. Pet. App. at 4a, 10a.

Under the court of appeals opinion, a litigant may be deprived of his or her right to judicial review (including review of a constitutional claim) by a jurisdictional "shell-game" where the circuit court adopts successive and contradictory rulings that ultimately cause a litigant to lose the ability to comply with any of those rulings. Neither the government nor the court of appeals suggests that such a rule reflects a defensible jurisdictional principle.

Instead, the court and respondents defend the jurisdictional *result* solely on the basis that the petitioners would have lost on the merits in any event and that a dismissal for lack of jurisdiction was therefore inconsequential. Thus, the court of the appeals and the government assert that the jurisdictional outcome is defensible *precisely because* the court determined that the *merits* should be decided adversely to the petitioners. Pet. App. at 10a (denial of jurisdiction did not matter because petitioners "would not have prevailed [on the merits] even if they hadn't dropped the jurisdictional ball");

Br. in Opp. at 17 (court of appeals "avoided any seeming unfairness" by examining merits).

Therefore, because the court of appeals' decision to apply the repeal of Section 2241 to these petitioners explicitly rests on its finding that petitioners would have lost on the merits had there been jurisdiction, the correctness of the court's merits ruling is necessarily outcome-determinative here. If reconsideration under *Hadix* entitles petitioners to prevail on the merits, then the court of appeals must also re-evaluate the jurisdictional dismissal.

c. The government's reliance on the circuit's later opinions reiterating the retroactivity (and equal protection) rulings disregards that the *LaGuerre* opinion is the Seventh Circuit's seminal ruling on the temporal scope (and constitutionality) of AEDPA 440(d), that the later decisions all rely on *LaGuerre*, and that the Seventh Circuit has never considered *Hadix* in any of its opinions. All of the Seventh Circuit cases cited by the government simply echo the holding in this case and do not consider *Hadix*.[4] Therefore, a remand of this case in light of *Hadix* will require reconsideration of the Seventh Circuit's decision on which all its subsequent rulings rest. There is no reason to assume that a *Hadix* remand would be disregarded by the court of appeals simply because later panels followed the pre-*Hadix* decision in this case.

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[4] In *Turkhan v. Perryman*, 188 F.3d 814 (7th Cir. 1999) (*"Turkhan II"*), on which the government principally relies, Br. in Opp. at 17, the court of appeals expressly relied – in the very language the government cites – on the merits ruling *in this case* and referred to it as the holding of *LaGuerre*. *See Turkhan II*, 188 F.3d at 827 ("we held [in *LaGuerre*] that AEDPA § 440(d) applies retroactively to bar covered criminal aliens from seeking a discretionary waiver of deportation under § [1182(c)]"). *See also id.* at 825-26 (citing *LaGuerre*). *See also Musto v. Perryman*, 193 F.3d 888, 891 (7th Cir. 1999) (relying on *LaGuerre*); *Chow v. Reno*, 193 F.3d 892, 893-94 (7th Cir. 1999) (*"Chow II"*) (same).

2. Jurisdiction.

The judgment dismissing petitioners' claims for lack of jurisdiction should also be vacated and remanded in light of later Seventh Circuit jurisdictional rulings. These rulings held that petitioners who relied on the unambiguous circuit precedent *barring* petitions for review should not be subjected to the circuit's new rule *requiring* such petitions if the deadline for filing has passed. Pet. Br. at 20-21. That is precisely the situation of these petitioners. Nonetheless, the government opposes a remand on jurisdiction based on its contentions that the Seventh Circuit's subsequent jurisdictional rulings are distinguishable, Br. in Opp. at 16; that an intra-circuit conflict does not warrant this Court's review, Br. in Opp. at 17; and that the petitioners suffered no unfairness because the opinion (and subsequent Seventh Circuit cases) examined the merits and rejected petitioners' claims. Br. in Opp. at 17.

a. As discussed in our Petition, the Seventh Circuit has recognized in subsequent decisions that the new jurisdictional ruling requiring petitions for review should not apply to bar jurisdiction of claims raised in habeas corpus petitions filed in response to the circuit's earlier – and contrary – precedent prohibiting petitions for review. *See Singh v. Reno,* 182 F.3d 504 (7th Cir. 1999)*; Turkhan II;* Pet. Br. at 21-22. The petitioners here are identically-situated in all relevant respects to the petitioners in *Singh* and *Turkhan II*, and the government offers no principled reason for applying a different rule to them.[5]

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[5] The government attempts to distinguish *Singh* by saying without explaining that it concerned "unusual circumstances" and a procedural due process claim, Br. in Opp. at 16 n.6, but neither the circumstances of Singh's case nor the nature of his claim distinguish that case for purposes of jurisdiction. Likewise, *Turkhan II* cannot have turned on the fact that Turkhan actually filed a petition for review that was dismissed, Br. in Opp. at 16 n.6, because *Turkhan II* applied the rationale of *Singh*, in which no petition for review had ever been filed. Nor would such a distinction make sense. *See* Pet. Br. at 21 n.14. In any event, the government's arguments for

b. Contrary to the government's argument, Br. in Opp. at 16-17, a remand order to resolve the intra-circuit conflict presented by this case fits easily within the Court's "broad power to GVR" under 28 U.S.C. 2106 (1999). *See Lawrence v. Chater*, 516 U.S. 163, 166 (1996). As this Court explained in *Lawrence*, "GVR conserves the scarce resources of this Court that might otherwise be expended on plenary consideration . . . and alleviates the 'potential for unequal treatment' that is inherent in our inability to grant plenary review of all pending cases raising similar issues." *Lawrence*, 516 U.S. at 167 (citation omitted).[6]

c. The government contends that there is no reason to remand on jurisdiction because the court of appeals made clear that petitioners would not have prevailed on the merits had the court found jurisdiction. As discussed above, the court of appeals may alter its view of the merits on remand in light of *Hadix*. But even if this case is remanded only on the jurisdictional question and not on the merits, a remand would serve a clear purpose – to afford the petitioners an explicit holding on the merits, which the government contends is necessary for this Court to exercise plenary review over this case. Thus, while petitioners contend that the Court can grant plenary review at this time on both the jurisdictional and merits questions, petitioners do not oppose a remand solely on jurisdiction if a more explicit holding on the merits is necessary. Especially in light of *Hadix* and the circuit split on retroactivity, these petitioners (and others in the Seventh Circuit) should not be subjected to mandatory deportation without an unambiguous – and reviewable – ruling on their claims.

In relation to this case as a whole, the government's position would deny petitioners all review of any claim.

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distinguishing *Singh* and *Turkhan II* should be directed to the court of appeals on remand.

[6] *Wisniewski v. United States*, 353 U.S. 901 (1957), cited by respondents, Br. in Opp. at 17, involved not a GVR but an attempted certification by a circuit court.

Relying on a "Catch-22" argument, respondents seek to insulate the merits from review on the ground that the court lacked jurisdiction, and seek to insulate the jurisdictional ruling on the ground that the court examined the merits. A remand on one or both issues avoids the impermissible result of that argument.

II. Alternatively the Court Should Grant Plenary Review on Jurisdiction and the Merits.

The split in circuit authority warrants this Court's plenary review, and the importance of the issues is not diminished by the fact that this case does not arise under the newly-instituted "removal" framework. For immigrants in the Seventh Circuit, who are the *only* longtime legal residents in the Nation subject to mandatory deportation based on the retroactive application of AEDPA 440(d), there is nothing "transitional" about this case. The court of appeals decision permanently resolves their rights under our immigration laws, and the consequence for them is banishment from the United States pursuant to an interpretation of the law that applies nowhere else in the country.

The number of individuals affected is substantial because the Seventh Circuit encompasses Illinois, a state with one of the largest immigrant populations in the country.[7] The INS previously argued to this Court that resolution of the temporal scope of Section 440(d) could affect as many as 77,000 immigrants nationwide, and that even under the most conservative calculations, the temporal scope of Section 440(d) would affect an estimated 8,000 pending immigration cases.[8]

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[7] Illinois had 457,000 legal permanent residents in 1996 and Indiana and Wisconsin together had 100,000. *See* "State Population Estimates: Legal Permanent Residents and Aliens Eligible for Naturalization," Immigration and Naturalization Service (Nov. 20, 1996).

[8] *See* Petition [of INS] for Writ of Certiorari, *INS v. Magana-Pizano*, No. 98-836, at 25; Petition [of Attorney General] for Writ of Certiorari, *Reno v. Navas*, No. 98-996, at 24-25.

The importance of national uniformity on eligibility for relief from deportation for legal permanent residents is further underscored by the government's statement that the Attorney General has "under consideration" a number of administrative proposals for responding to the circuit court opinions that have rejected her *Soriano* ruling. Br. in Opp. at 25. The tentative nature of the government's representation suggests that administrative action is far from certain. Therefore, absent plenary review (or remand) by this Court, immigrants who would be eligible for relief in other circuits will continue to be denied relief and deported in the Seventh Circuit.

CONCLUSION

The writ should be granted and the judgment vacated and remanded to the court of appeals in light of *Martin v. Hadix* and in light of subsequent developments in the Seventh Circuit, or the case should be accepted for plenary review.

Respectfully submitted,

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